IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1330

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Petitioners*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

No. 73-1667

FEDERAL POWER COMMISSION, *Petitioner*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

Petitions for Certiorari Filed March 11, 1974, and May 8, 1974
Certiorari Granted June 10, 1974

BRIEF OF
ARIZONA PUBLIC SERVICE COMPANY, ET AL.

(See list of attorneys on inside cover)

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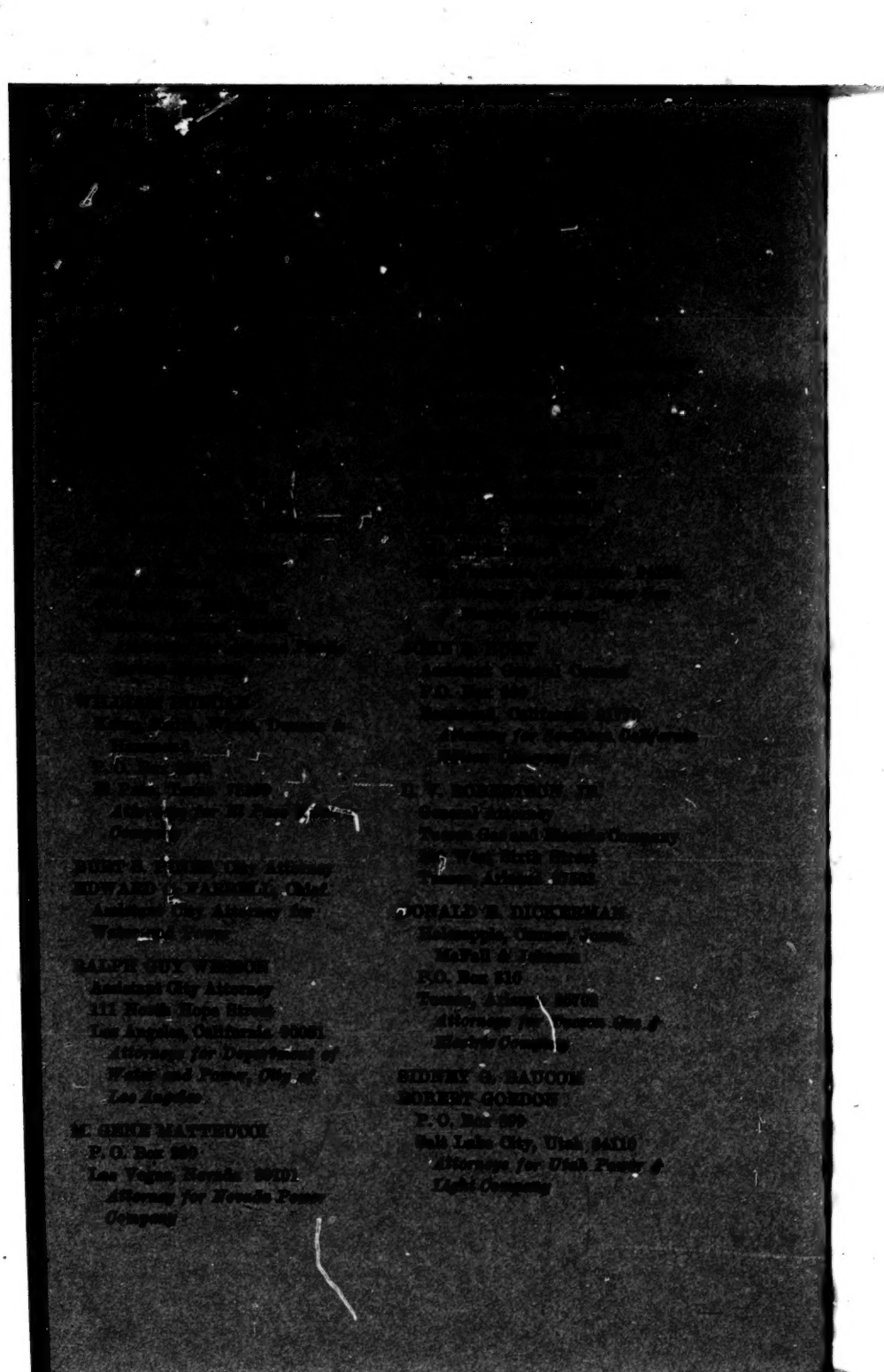

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1380

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Petitioners*

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v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

Petitions for Certiorari Filed March 11, 1974, and May 6, 1974
Certiorari Granted June 10, 1974

BRIEF OF
ARIZONA PUBLIC SERVICE COMPANY, ET AL.

OPINIONS BELOW

The opinion of the court below is that of the United States Court of Appeals for the District of Columbia Circuit in *Chemehuevi Tribe of Indians, et al.* v. *Federal Power Commission,* 489 F.2d 1207 (D.C. Cir. 1973), *rehearing denied* December 7, 1973, and Decem-

ber 19, 1973, on a petition of Chemehuevi Tribe of Indians, et al., for review of orders of the Federal Power Commission in Docket No. E-7664, dated November 4, 1971 (reported at 46 F.P.C. 1120), and December 10, 1971 (reported at 46 F.P.C. 1307).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the court of appeals was founded on Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*. Its judgment was entered November 9, 1973.

On June 10, 1974, the Supreme Court granted the petition for certiorari of these petitioners in *Arizona Public Service Co., et al.* v. *Chemehuevi Tribe, et al.*, No. 73-1666, the petition of the Federal Power Commission in *Federal Power Commission* v. *Chemehuevi Tribe, et al.*, No. 73-1667, and the cross-petition of the Chemehuevi Tribe, et al., in *Chemehuevi Tribe, et al.* v. *Federal Power Commission*, No. 73-1380, and ordered the three cases consolidated.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a justiciable case or controversy is presented, and, in particular:

A. Whether legislation delegating to the Secretary of the Interior all federal authority with respect to the consumptive use of waters of the Colorado River System supplied from government dams has superseded Section 4(e) of the Federal Power Act with respect thereto, if that section was ever applicable to such uses, thereby rendering moot the court of appeals interpretation of Section 4(e) as requiring Federal Power Commission licenses for the use of such waters by the steam-electric generating plants involved in this case.

B. Whether the complainants lack standing to litigate the issue of whether the Secretary of the Interior or the Federal Power Commission has jurisdiction to license the consumptive use of water from government dams in the Colorado River Basin.

If, as we believe, no justiciable case or controversy is presented, this Court may properly reverse and vacate the judgment below as an advisory opinion, inasmuch as the question of construction of Section 4(e) need not have been reached.

Otherwise the issues encompass:

2. The question presented by the petition for a writ of certiorari of the Chemehuevi Tribe of Indians, et al., in No. 73-1380:

"Whether the court below properly construed the term 'project works' in Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), to be limited to hydroelectric plants, thereby excluding fossil-fueled thermal-electric plants from the licensing authority of the Federal Power Commission."

We would answer this in the affirmative.

3. The question presented in our petition in No. 73-1666:

"Whether Section 4(e) of the Federal Power Act (16 U.S.C. Sec. 797(e)), which authorizes the Federal Power Commission to issue a license 'for the purpose [*inter alia*] of utilizing the surplus water or water power from any Government dam,' requires that a license be obtained for the use of water by thermal electric generating plants solely for boiler and cooling purposes, as contrasted with the use of water or water power for hydroelectric power generation."

We would answer this in the negative, as the Solicitor General answered a similar question in his petition.

As all of these are issues of law, remand to the Commission for further determinations, ordered by the court of appeals, is not warranted.

PROVISIONS OF STATUTES AND INTERSTATE COMPACTS

Relevant extracts from the statutes and compacts involved are printed as Attachment A to this brief. They are:

Sections 4(e), 10(e) and 23 of the Federal Power Act, 16 U.S.C. §§ 797(e), 803(e), 817.

Sections 5 and 6 of the Boulder Canyon Project Act, 43 U.S.C. § 617d, e.

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c).

Section 4 of the Colorado River Storage Project Act, 43 U.S.C. § 620c.

Sections 11(a), (b), 13(a), (b), 14 of the Navajo-San Juan Chama Project Act, 43 U.S.C. §§ 615ss (a), (b), 615uu(a), (b), 615vv.

Act of March 22, 1968, Pub.L. 90-272; 82 Stat. 52; U.S. Code Cong. & Admin. News at 63 (1968).

Sections 301(b), (c), and 303(a), (b), (c), (d) of the Colorado River Basin Project Act, 43 U.S.C. §§ 1521 (b), (c), 1523(a),(b),(c),(d).

Articles III(a), (d), (e), and VIII of the Colorado River Compact, H.R.Doc. 717, 80th Cong., 2d Sess. A19, A21 (1948).

Article III(a) of the Upper Colorado River Basin Compact, H.R. Doc. 717, 80th Cong., 2d Sess. A169 (1948).

STATEMENT OF THE CASE

1. Summary

The Chemehuevi and Cocopah Tribes of Indians, alleging ownership of water rights in the Colorado River, joined by others who did not assert such ownership, filed a complaint with the Federal Power Commission, asking that the Commission exercise licensing jurisdiction under Section 4(e) of the Federal Power Act over six steam-electric generating plants, in four States, which utilize waters of the Colorado River System in their boilers and for cooling purposes. The complaint alleged that these plants are "project works" along navigable waters, that they also utilize "surplus" waters from government dams, and that Section 4(e) of the Act confers licensing jurisdiction over steam-electric generating plants in such circumstances. The Commission, sua sponte, dismissed the complaint for lack of jurisdiction over steam plants, holding (as it had for more than a half-century) that its jurisdiction under Part I of the Act is limited to hydroelectric projects. The court of appeals, while agreeing with the Commission that Section 4(e) of the Act does not extend the Commission's licensing jurisdiction to steam-electric generating plants as "project works" in consequence of their use of waters of a navigable stream, nevertheless held that this section does confer licensing jurisdiction on the Commission with respect to utilization by steam plants of "surplus water . . . from any Government dam" for such purposes. It remanded the case to the Commission to determine whether the water used in the six steam-electric generating plants involved here is "surplus water," and whether any jurisdiction that the Commission might have is affected in any way by the jurisdiction of any other federal agency. It did not define the term "surplus water."

The uses of water (that the court of appeals said may be "surplus water . . . from any Government dam") made by these plants in boilers and cooling systems are "consumptive uses," that is, the quantity returned to the stream is less than the quantity diverted.[1] The consumptive use of water is to be distinguished from non-consumptive uses, *e.g.,* in the generation of hydroelectric power.

These six thermal plants consume waters of the Colorado River System in conformity with the "Law of the River," *i.e.,* the apportionments of consumptive use made in the Colorado River Compact, the Upper Colorado River Basin Compact, the Mexican Water Treaty, the decree of this Court in *Arizona* v. *California, et al.,* 376 U.S. 340 (1964), and several federal statutes, discussed in Part I of this brief, which delegate to the Secretary of the Interior, exclusively, all federal authority with respect to the consumptive use of all water stored by government dams in the Colorado River Basin. The plants which use water supplied from government dams do so pursuant to contracts with the Secretary made under the authority of those statutes.

Although the court below referred to the six power plants collectively as "the Four Corners plants," the distance between the Mohave Plant and the Four Corners Plant, 375 miles, is about equal to the distance between Washington and Toronto. A map, Item 4 of the separately printed Supplement to this brief, illustrates the large distances involved.

In more detail:

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[1] Arizona v. California, 373 U.S. 546, 557, n. 23 (1963). The quantity thus "permanently withdrawn" is quoted by the court of appeals (App. 52) from our adversaries' brief in the court of appeals as aggregating 250,000 acre-feet annually.

2. The complaint filed with the Federal Power Commission

On September 10, 1971, the Chemehuevi Tribe of Indians, et al.[2] (Complainants), filed with the Federal Power Commission a Complaint, Petition for Order to Show Cause and Request for Expedited Procedure, against Arizona Public Service Company, et al.,[3] asking the Commission to assert licensing jurisdiction under Part I of the Federal Power Act[4] over six planned or existing steam-electric generating plants in the Southwest which consume waters of the Colorado River System in their boilers and for cooling purposes[5] (App. 1).

3. The Power Plants Involved

Water for consumption in boilers and cooling systems is supplied to the Mohave Plant, in southeastern Nevada, from Hoover Dam; to the Navajo Plant, in

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[2] The Cocopah Tribe of Indians, the Sierra Club, Committee to Save Black Mesa, Emma Yazzie, Jimmie Yazzie, Paul Begay, Chester Hugh Benally, and Ben Begay.

[3] Ten "complainees" were named: Arizona Public Service Company, Southern California Edison Company, Salt River Project Agricultural Improvement and Power District, Tucson Gas & Electric Company, El Paso Electric Company, Nevada Power Company, Utah Power & Light Company, Department of Water and Power of the City of Los Angeles, San Diego Gas & Electric Company, Public Service Company of New Mexico.

[4] 16 U.S.C. §§ 792-823. Part I, captioned "Regulation of the Development of Water Power and Resources," was enacted in 1920 as the Federal Water Power Act.

[5] The power plants are identified at pp. 7-9, *infra*, and, with the federal contracts involved, are described in Item 2 of the Supplement to this brief, which reproduces the findings of fact in Jicarilla Apache Tribe of Indians, et al. v. Morton, et al., 3 ERC 1919 (D. Ariz. 1972), *aff'd*, 471 F.2d 1275 (9th Cir. 1973), a case in which all of the complainants (respondents) except the Chemehuevi and Cocopah Tribes were parties. See also Yazzie, et al. v. Morton, et al., 59 F.R.D. 377 (1973). Plant ownerships, as among the petitioners, are tabulated in Item 3 of the Supplement. Item 4 is a location map.

northern Arizona, and the (proposed) Kaiparowits Plant in southern Utah, from Lake Powell, the reservoir created by Glen Canyon Dam; to the Huntington Plant, in Utah, from a Reclamation reservoir on a tributary of the Colorado River; to the San Juan Plant, in northwestern New Mexico, from the Navajo Dam; to the Four Corners Plant, in northwestern New Mexico, from the San Juan River.

Each plant which uses water supplied from a government dam does so pursuant to a contract with the Secretary of the Interior,[6] made under statutes which specify that no water stored by such a dam may be used except by contract with the Secretary. Five of the six plants are in this category, although one of them, Huntington, also uses water appropriated under the laws of Utah from the natural unregulated flow of certain streams. The sixth plant, Four Corners, uses water under appropriations from the natural unregulated flow of the San Juan River made under the laws of New Mexico prior to the authorization of any government dam on that stream.[7]

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[6] Certified copies of water contracts have been filed with the Court.

[7] The findings of fact in *Jicarilla*, Supp. at 94s-128s, state, with reference to the Four Corners Plant:

> ". . . Water for use of Units 1-5 (about 51,600 acre-feet annually) is obtained from the San Juan River under diversion rights granted by the New Mexico State Engineer in 1955. A water service contract approved by Congress was executed by the Secretary of the Interior in April 1968 with Utah Mining and Construction Company for 44,000 acre-feet of water from the Navajo Reservoir, a Bureau of Reclamation facility, for possible future development of coal resources."

Counsel are advised, however, that no use of water by the Four Corners Plant or any other power plant has been made under that contract.

The six power plants are expected to supply 22% of the power requirements of consumers in the States of Arizona, California, Nevada, Utah, New Mexico, and Texas, in 1980.[8]

The locations of the plants are shown on the map, Item 4 of the Supplement to this brief. They are described in general terms in the court of appeals opinion (App. 41-43), and in greater detail in the findings of fact in *Jicarilla Apache Tribe of Indians, et al.* v. *Morton, et al.*, 3 ERC 1919 (D. Ariz. 1972), *aff'd*, 471 F.2d 1275 (9th Cir. 1973), reproduced as Item 2 of the Supplement to this brief.[9] Their ownerships are tabulated in the Supplement, Item 3.

All of the power plants are also the subject of contracts between their owners and the Secretary of the Interior involving one or more of the following: use of federal land, Indian land, federal ownership participation (in one plant, Navajo), coal rights, easements, and rights-of-way.[10] The extensive federal involvement with each of these plants, including the Secre-

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[8] *Problems of Electrical Power Production in the Southwest*, S. REP. No. 92-1015, 92d Cong., 1st Sess. at 48 (1972).

[9] The plants were the subject of congressional oversight hearings, *Problems of Electric Power Production in the Southwest, Hearings Before the Senate Comm. on Interior and Insular Affairs*, Parts 1-7, 92d Cong., 1st Sess. (1971), a Senate report, S. REP. No. 92-1015, 92d Cong., 1st Sess. (1972), and the DEPARTMENT OF THE INTERIOR, SOUTHWEST ENERGY STUDY, SUMMARY REPORT (1972).

[10] A summary of these contracts, as of 1972, can be found in S. REP. No. 92-1015, 92d Cong., 1st Sess., at pp. 102-110 (1972). Another listing can be found in *Problems of Electrical Power Production in the Southwest, Hearings before the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess., Part 6, at 1961-70 (1971).

tary's authority with respect to pollution control, is set forth in the findings of fact in the *Jicarilla* case. (Supplement, Item 2).

4. The Complainants

The complainants are:

(1) The Chemehuevi Tribe of Indians, whose reservation is in California, some 110 miles below Hoover Dam, 40 miles from the nearest power plant, Mohave, 385 miles from the most distant, Huntington, 365 miles from Four Corners. Its water rights were decreed in *Arizona* v. *California, et al.,* 376 U.S. 340 (1964).

(2) The Cocopah Tribe of Indians, residing south of Yuma, Arizona, 235 miles below Hoover Dam, 175 miles from the nearest plant, Mohave, 510 miles from Huntington, 455 miles from Four Corners. Its water rights were also decreed in *Arizona* v. *California.*

(3) The Sierra Club.

(4) The Committee to Save Black Mesa (a source of coal supplied to certain of these plants under contracts made by the Navajo Tribal Council).

(5) Five individuals, members of the Navajo Tribe.

5. The Commission's Order

The Commission, sua sponte, entered an order November 7, 1971 (App. 22), dismissing the complaint for lack of jurisdiction over steam-electric generating plants, citing *FPC* v. *Union Electric Co.,* 381 U.S. 90 (1965). It denied a petition for rehearing December 10, 1971 (App. 28).

6. Opinion of the Court of Appeals

The complainants petitioned the Court of Appeals for the District of Columbia Circuit to review the Commission's orders, under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

On November 9, 1973, the court handed down its opinion (App. 38). The court identified two issues (App. 53):

> "Petitioners contend that FPC jurisdiction is properly invoked under § 4(e) of the Federal Power Act for two reasons: either because the six plants identified in the complaint are 'project works' necessary for the development of power along navigable waters or because the plants will utilize 'surplus water' from Government dams."

As to the first ground, the court held that the six plants are not "project works" necessary for the development of power along navigable waters, and accordingly that the "navigable waters" clause of Section 4(e) did not confer licensing authority on the Commission. The court said, *inter alia* (App. 72):

> "The history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power."

Again (App. 90):

> ". . . Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness."

It might be thought that these conclusions disposed of the entire case.

Not so. Turning to the "surplus water" language of Section 4(e), the court said (App. 97-98):

> "Petitioners contend that two of the Four Corners plants—Navajo and Kaiparowitz [*sic*]—will withdraw water directly from impoundments created by a Government dam, and that the other four plants are downstream from Government dams and will have water available on a dependable basis only because of the 'stream regimen imposed by upstream government dams'. [Footnote omitted.] According to petitioners, these are usages of 'surplus water' that invoke Commission jurisdiction under § 4(e) and require the Commission to regulate the operations of the Four Corners plants. We agree that § 4(e) empowers the FPC to license the use of surplus water by steam plants, and accordingly we remand to the Commission for consideration of petitioners' 'surplus water' claim."

After citing pre-Federal Water Power Act cases involving hydroelectric projects using water diverted from reservoirs created by government dams, the court said (App. 112):

> "... We hold only that *the Commission does have jurisdiction to license the utilization of surplus water*[11] *by thermal-electric generating plants,* and we leave to the Commission to determine in the first instance whether the plants involved in this appeal fall within the category asserted by peti-

[11] (Our footnote). For examples of the licensing of surplus water for use by hydroelectric power plants, see Green Mountain Power Corp., 13 F.P.C. 1211 (1954) (power plant constructed at government dam); Utah Power & Light Company, 31 F.P.C. 958 (1964) (water diverted by canal from reservoir to private property); Alabama Power Company, 34 F.P.C. 1108 (1965) (power plant constructed at government dam).

> tioners. In determining this question, the Commission should also consider whether any jurisdiction it might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency." (Emphasis added; footnote omitted.)

The sentence last quoted reflects the court's awareness, stated earlier in the opinion (App. 94) that:

> ". . . there may be federal legislation peculiarly applicable to the operations of particular power plants, such as the extensive regulation of withdrawals of water from the Colorado River system." [12]

SUMMARY OF ARGUMENT

I.

Although we would welcome a decision on the merits, we feel constrained to place before the Court the considerations which, in our view, lead to the conclusion that the judgment below should be reversed and vacated for lack of a justiciable controversy, inasmuch as (A) legislation subsequent to the Federal Power Act has made Section 4(e), whatever its meaning, inapplicable to the consumptive use of waters of the Colorado River System, and (B) all of the complainants lack standing to litigate the issue which is here for decision, *i.e.*, jurisdiction as between the Secretary of the Interior and the Federal Power Commission.

A.

The decision below, construing Section 4(e) in relation to these six steam plants, was an advisory opinion, not applicable to the case before it.

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[12] See note 14, *infra*, for examples cited by the court.

Congress has delegated to the Secretary of the Interior, to the exclusion of the Federal Power Commission, all federal authority relating to the consumptive use of waters stored by government dams in the Colorado River Basin, impressing thereon the "Law of the River," a complex of compacts, treaty, federal statutes, and court decisions. Use of water in steam-electric generating plants is a consumptive use which, by specific statutory direction, can be supplied from government dams in the Colorado River Basin only pursuant to contract with the Secretary of the Interior, as contrasted with the non-consumptive use of the kinetic energy in falling water by means of hydroelectric projects, left subject to license by the Commission. Thus Congress, by statutes subsequent to the Federal Power Act, has restricted the licensing functions of the Federal Power Commission in the Colorado River Basin to hydroelectric power projects, whatever may be the Commission's functions in other parts of the country. All of the power plants involved here which use water from government dams are supplied that water by the Secretary under his contracts, in obedience to statute. The court of appeals, instead of remanding the case to the Commission to determine whether Congress had delegated authority to dispose of surplus water from government dams in the Colorado River Basin to agencies other than the Federal Power Commission, should have determined, itself, as a matter of law, that Congress has made that delegation to the Secretary of the Interior, and so should have affirmed the Commission's order dismissing the complaint for lack of jurisdiction.

B.

Injury is an essential element of "standing." That element is lacking here.

The only issue requiring decision in the suit brought by these complainants is whether the Secretary of the Interior or the Federal Power Commission shall license the consumptive use of water stored by government dams. No complainant will be affected one way or the other by that decision. The environmental concerns which they voice are not here for resolution. As both the Commission and the Secretary are subject to the same statutory controls relating to protection of the environment, the complainants would have exactly the same remedies, irrespective of whether the Secretary or the Commission should sign the document authorizing the consumptive use of water from these Colorado River dams.

The complainants other than the Chemehuevi and Cocopah Tribes have all been plaintiffs in other unsuccessful suits against these plants, raising environmental issues. Apparently the two tribes have been joined on this occasion because they own water rights in the Colorado River, alone among all the complainants.

But injury to these tribes in their capacity as water users is precluded by the "Law of the River." The decision and decree of this Court in *Arizona* v. *California, et al.*, awarded these tribes "present perfected rights" of such high priority as to protect them totally against shortages occasioned by any other users. Federal legislation implementing that decree made certain that all shortages must be borne by others. Moreover, the de-

cree precludes any complaint by these tribes against consumptive use by the Mohave Plant in Nevada, inasmuch as its use is within the apportionment made by the decree to Nevada. The Colorado River Compact precludes their complaint against consumptive use of water by any of the five plants in the Upper Basin. As no use of water by any of the six plants can cause injury to these tribes, their complaint that such use may cause shortages is moot. Beyond this, the Commission has no jurisdiction to adjudicate water rights either as to quantity or quality of water. Indeed, Article II of the decree in *Arizona* v. *California* enjoins the United States, its officers, attorneys and employees (including, of course, the Federal Power Commission as well as the Secretary) from operating structures or releasing waters otherwise than in accordance with the decree.

If the Court, nevertheless, concludes that it was necessary for the court of appeals to decide the questions of whether Section 4(e) of the Federal Power Act confers licensing jurisdiction on the Federal Power Commission (i) over thermal electric plants as "project works" along navigable waters, or (ii) over the consumptive use by thermal electric plants of waters stored by government dams, then the decision below should be affirmed with respect to the first point, and reversed with respect to the second, for the following reasons:

II.

The rationale of the court's proper conclusion, that the licensing jurisdiction of the Commission over "project works" does not extend to steam plants which use the waters of a navigable stream in their boilers

and cooling apparatus, logically requires the conclusion that its licensing jurisdiction does not encompass the consumptive use of "surplus water . . . from any Government dam" by the same kind of plant from the same stream for these same purposes.

The text of the Act, the 1935 amendments, legislative history, the rationale of this Court's opinion in *FPC* v. *Union Electric Co.*, and 54 years of administrative construction, all require the same conclusion in the one case as in the other.

A.

The language of the Act is wholly devoted to the terminology and problems associated with hydroelectric power. It is totally lacking in criteria and detail which would be necessary to give the Commission guidance if it were expected to license steam power plants, which are never mentioned. Steam-electric power generation cannot be made to fit a statute minutely designed to enhance and regulate the development of another source of energy: the Federal *Water Power* Act, as its authors appropriately named it.

B.

In 1935 Congress made two significant decisions in amending the Federal Water Power Act.

It rejected an amendment which would have given the Commission "certification" authority over electrical production facilities other than hydroelectric projects, *e.g.*, steam-electric generating plants.

At the same time, Congress amended Section 10(f) to provide that where a "project not under license" is benefited by construction by the United States (or an-

other) of a "headwater improvement," the Commission is authorized to require an equitable annual charge to be paid on account of such benefits received by the "unlicensed project." This negates the court's assumption that the use of water in a reach of a stream where the regimen is affected by an upstream government dam is, by hypothesis, use of surplus water from that dam, subjecting the user to the requirement of a license. If the court were right, there could not be an "unlicensed project" in these circumstances.

C.

This Court's interpretation of the Federal Power Act in *FPC* v. *Union Electric Co.* (the *Taum Sauk* case), consistently with earlier cases, has limited the Commission's licensing jurisdiction to the utilization of the power potential in water.

D.

The administrative construction for 54 years has consistently restricted the Commission's licensing jurisdiction to hydroelectric projects, and is entitled to great weight. Congress, with such views before it, has several times amended the Federal Power Act without expressing dissatisfaction with that construction. The Commission, in so advising Congress, has never suggested that its disclaimer applied only to steam plants using navigable waters, whereas steam plants using surplus water from government dams were within its licensing jurisdiction. Instead, it proposed (but without success) legislation that would for the first time (as it said) give it licensing jurisdiction over steam plants.

III.

The legislative history of Section 4(e) of the Federal Power Act is reviewed in detail in Item 1 of the Supplement to this brief, separately bound. This shows unmistakably that the "surplus water" clause, like the "project works" clause, was intended to apply only to hydroelectric projects. The references to steam power were in the context of an unlicensed competitor with hydroelectric projects. No consumptive uses, *e.g.*, irrigation and industrial uses, were to be regulated by the Commission.

The court's assumption that the Waterways Commission which Congress authorized in 1916 was intended to have jurisdiction of some sort with reference to steam plants, and that the repeal of that authorization which was effected by the Federal Power Act was intended to transfer such jurisdiction to the Commission, is refuted by the legislative history of both acts. The Waterways Commission was solely an investigatory agency, with no licensing powers. Steam plants were not even in the statutory inventory of subjects it was to investigate. But, whatever the intended scope of the Waterways Commission's inquiries may have been, the Senate, in approving the Federal Water Power Act, rejected a proposed amendment which would have transferred all the functions of the defunct Commission to the new one. Clearly, the demise of the Waterways Commission did not kindle an implied jurisdiction in the Federal Power Commission that the Federal Water Power Act failed to state and that its legislative history does not suggest.

ARGUMENT

I.

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED AND VACATED FOR LACK OF A JUSTICIABLE CONTROVERSY.

A. The elements of justiciability

The Court, in *Gilligan* v. *Morgan,* 413 U.S. 1, 9-10 (1973), citing *Flast* v. *Cohen,* 392 U.S. 83, 95 (1968), noted particularly three criteria of justiciability:

> "In determining justiciability, the analysis in Flast thus suggests that there is no justiciable controversy (a) when the parties are asking for an advisory opinion, (b) 'when the question sought to be adjudicated has been mooted by subsequent developments,' and (c) 'when there is no standing to maintain the action.' As we noted in Poe v Ullman, 367 U.S. 497 (1961), and repeated in Flast, '[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . .'"

By all three of these tests, the case presented by respondents (complainants) fails to present a justiciable case or controversy. They do indeed ask for an opinion that can only be advisory with respect to the meaning of the surplus water clause of Section 4(e), because "subsequent developments," *i.e.,* subsequent acts of Congress, have made that provision inapplicable to the consumptive use of water from government dams in the Colorado River Basin, whatever the scope of that section may be elsewhere. Moreover, all of the complainants lack standing, because none of them alleges an interest which would be affected by the resolution of the question of whether the Secretary of the Interior or the Federal Power Commission has

jurisdiction to control the use of water supplied to steam plants from government dams in the Colorado River Basin. That is the question here for decision.

B. Section 4(e) of the Federal Power Act has no application to the consumptive use of waters of the Colorado River System, having been superseded by legislation which delegates exclusively to the Secretary of the Interior all federal authority relating to the consumptive use of such waters from government dams. He has exercised that authority by his contracts.

1. *The significance of the "Law of the River."*

The Court has before it the question of whether licenses under Section 4(e) of the Federal Power Act are required for six specific steam-electric generating plants which use waters of the Colorado River System. Their use of water is a consumptive use,[13] in boilers and cooling apparatus, as distinguished from the nonconsumptive use of the kinetic energy of falling water in hydroelectric generating plants. The decree in *Arizona* v. *California,* 376 U.S. 340 (1964), defined "domestic use" to "include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power," *i.e.,* hydroelectric power. *Id.* at 341 (Article I(I)). This paraphrases Article II(h) of the Colorado River Compact. The use of water by steam plants is an industrial use.

The consumptive use of waters of the Colorado River System is controlled by the "Law of the River," a complex of federal statutes, opinions and a decree of this Court, interstate compacts, the Mexican Water Treaty, and contracts executed by the Secretary which are subject to all of the foregoing.

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[13] Diversions less returns to the river, Arizona v. California, decree, 376 U.S. 340 (1964) (Art. I(A)); opinion, 373 U.S. 546, 557 n. 23 (1963).

The court below conceded (App. 94) that:

> ". . . there may be federal legislation peculiarly applicable to the operations of particular power plants, such as the extensive regulation of withdrawals of water from the Colorado River system."[14]

The court, in our view, should have proceeded to examine the cited statutes, and to determine that they vest exclusive jurisdiction in the Secretary of the Interior to control all consumptive uses of water supplied from government dams, precluding the licensing jurisdiction of the Federal Power Act with respect to consumptive use of waters of the Colorado River System, whatever its jurisdiction may be with respect to steam plants in other basins. It erred, we submit, in proceeding to the interpretation of Section 4(e) with respect to steam plants generally, in a case to which Section 4(e) is not applicable. Its opinion is, therefore, an advisory one.

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[14] The footnote to the quoted sentence (App. 94, n. 135) identifies a number of the elements of the Law of the River:

> "[135] The Colorado River is apportioned between the Upper and Lower Basin states by the Colorado River Compact, *see* 70 Cong. Rec. 324 (1928), and among the states within the basin by the Upper Basin Compact, 63 Stat. 31 (1949), and the Boulder Canyon Project Act, 43 U.S.C. §§ 617-617u (1970). *See* Arizona v. California, 373 U.S. 546 (1963). In times of shortage, the Secretary of the Interior has authority to allocate the waters among the states and among the users of each state, *See* Arizona v. California, *supra*, 373 U.S. at 579-90. Other federal controls over the flow of the river are provided by the Mexican Water Treaty, T.S. 994, 59 Stat. 1219; the Colorado River Storage Project Act, 43 U.S.C. §§ 620-620o (1970); and the Colorado River Basin Project Act, 43 U.S.C. §§ 1501-56 (1970). For a history and discussion of the Colorado River legislation, see H.R. Rep. No. 1312, 90th Cong., 2d Sess. (1968), in 3 U.S. Code Cong. & Ad. News 3666 (1968)."

2. *The Boulder Canyon Project Act,* 43 U.S.C. § 617 et seq.

The statutory pattern of the Law of the River was set by the Boulder Canyon Project Act, 43 U.S.C. § 617 et seq. This statute explicitly vests exclusive authority in the Secretary, not the Federal Power Commission, to control the use of water stored by Hoover Dam not only at the dam, but at all points between the dam and the Mexican border.

Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d, provides in part:

> "Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon . . . . Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. *No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.*" (Emphasis added.)

The congressional decision to vest plenary authority in the Secretary, not the Commission, was deliberate. This act ended a contest which had persisted through four Congresses over the development of the water resources of the Lower Colorado River Basin.[15] Power

[15] Bills for construction of the Boulder Canyon Project were introduced in four consecutive Congresses by Congressman Swing and Senator Johnson beginning in 1922. A chronology of this and earlier congressional consideration of the Project is found in *Hearings on the Protection and Development of the Lower Colorado River Basin (H.R. 5773) Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess., pt. 1, at 8-10 (1928) (statement by Committee Chairman Smith).

development was a major issue. There were members of Congress who believed that private interests should be licensed under the Federal Water Power Act to construct a dam and power plant in Boulder or Black Canyon. [16] Others insisted that the federal government should do so. [17] The latter prevailed. [18] A compromise

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[16] *E.g.*, the discussion of private applications for development of the site in *Hearings on the Protection and Development of the Lower Colorado River Basin (H.R. 11449) Before the House Committee on Irrigation of Arid Lands*, 67th Cong., 2d Sess. 128, 170, 187 (1922), and in *Hearings on the Protection and Development of the Lower Colorado River Basin (H.R. 2903) Before the House Committee on Irrigation and Reclamation*, 68th Cong., 1st Sess. 480, 523 (1924). In a letter dated March 24, 1924, the three members of the Federal Power Commission recommended to the House committee that the Commission should be entrusted with the supervision of the water power aspects of the project. *Id.* at 1002. By the time of final floor debate in 1928, the issue of federal construction of the dam had been resolved, but disagreement continued on whether the power works at the dam site should be federally built or privately built under FPC or Interior license. Senator Hayden offered a floor amendment to make the FPC the licensing authority. 69 CONG. REC. 10275 (1928). His amendment was discussed and offered but never voted upon. *Id.*; 70 CONG. REC. 80 (1928).

[17] *E.g.*, *Hearings on the Lower Colorado River Basin (H.R. 2903) Before the House Committee on Irrigation and Reclamation*, 68th Cong., 1st Sess. 1778-80 (1924) (statement by Congressman Swing). Congressman Davenport offered a floor amendment to insure that the federal government would build the power plant, 69 CONG. REC. 9976-78 (1928), and although the amendment was accepted by the House, it was not part of the Senate substitute bill, 70 CONG. REC. 600 (1928), and was not insisted upon by the House. *Id.* at 831-32.

[18] *Hearings on Boulder Dam (H.R. 9826) Before the House Committee on Rules*, 69th Cong., 2d Sess. 111 (1927) (testimony of Congressman Swing); *Hearings on the Colorado River Basin (H.R. 6251 and H.R. 9826) Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 32 (1926) (testimony of Senator Hayden).

proposal that the government build the dam, but license the use of the water power there under the surplus water clause of Section 4(e) of the Federal Water Power Act, was offered by Congressman Leatherwood in the House committee:[19]

> "The Secretary of the Interior is hereby authorized to permit the use of surplus waters, not required for irrigation or domestic uses, by any political subdivisions, or municipal or private corporations, who shall become licensees for the purpose under the Federal water power act, approved June 10, 1920, as provided therein for the use of surplus water at Government dams. The Federal Power Commission is hereby authorized to issue preliminary permits and licenses for the purpose of utilizing the surplus water or water power from said dam . . . ."

The amendment was discussed later by the Irrigation and Reclamation Committee in closed session, where it received only three votes and was defeated.[20] Instead, the Secretary of the Interior was authorized to construct the dam, and, at his option, to construct the power plant and lease it out, or operate it and sell energy therefrom, or to lease out falling water to an entity which might construct the plant. Section 6 of Boulder Canyon Project Act, 43 U.S.C. § 617e.

The Boulder Canyon Project Act contains numerous references to the Federal Power Act, but only for the purpose of assimilating provisions or policies of the

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[19] *Hearings on the Colorado River Basin (H.R. 6251 and H.R. 9826) Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 244-48 (1926).

[20] *Hearings on Boulder Dam (H.R. 9826) Before the House Committee on Rules,* 69th Cong., 2d Sess. 38-40 (1927).

Federal Power Act in the authority delegated to the Secretary, not for the purpose of subordinating his contracts to the jurisdiction of the Commission. *E.g.*, Secs. 5(c), 13(c), 43 U.S.C. §§ 617d(c), 617*l*(c).

Amendments made by the Boulder Canyon Project Adjustment Act in 1940, 43 U.S.C. § 618, directed that revenues be deposited in designated funds, for specific purposes. [21]

This Court, in *Arizona v. California,* 373 U.S. 546, 579-80 (1963), said:

> "Having undertaken this beneficial project, Congress, in several provisions of the Act, made it clear that no one should use mainstream waters save in strict compliance with the scheme set up by the Act. Section 5 authorized the Secretary 'under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river . . . as may be agreed upon, for irrigation and domestic uses . . . .' To emphasize that water could be obtained from the Secretary alone, § 5 further declared, 'No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.'
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[21] As will be noted, each of the later Colorado River statutes directs that revenues from disposition of stored water and power accruing to the United States be deposited in special funds related to development of the water resources of the Colorado River Basin. This is in contrast with Section 17 of the Federal Power Act, 16 U.S.C. § 810, which, as amended in 1935, requires that revenues (including those from "surplus water") be allocated to specified funds quite different from those named in the Colorado River legislation.

> "These several provisions, even without legislative history, are persuasive that Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States *and to decide which users within each State would get water.*" (Emphasis added.)

In an earlier *Arizona v. California* case, 298 U.S. 558, 570 (1936), the Court had spoken in the same vein:

> ". . . the United States, by congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, *to impound, and control the disposition of the surplus water in the river not already appropriated.*" (Emphasis added.)

Section 5 of the Project Act is dispositive of the case as to the Mohave Plant. This plant, located downstream from Hoover Dam, uses water pursuant to a contract made under Section 5 of the Project Act. After this Court's decision and decree in *Arizona v. California,* awarding Nevada the consumptive use of 300,000 acre-feet annually and requiring contracts of individual water users with the Secretary, he made his contractual arrangements in two phases, simultaneously, for the supply of water for the Mohave Plant. On October 26, 1966, he contracted with the State of Nevada to deliver from storage in Lake Mead up to 30,000 acre-feet annually for use in this plant for a period of 35 years, the United States to construct the necessary diversion works (Supplement at 101s), and on the same date approved a companion contract between the State and the owners of the plant whereby the State redelivered the same quantities to the plant,

at a slightly higher price. Both contracts contain detailed environmental provisions. (*Id.* at 102s.)

While the Mohave Plant is the only one of the six which receives water under the terms of the Boulder Canyon Project Act, the policy set by that act, of exclusive delegation to the Secretary of all federal authority with respect to consumptive uses of water supplied from government dams, has been followed in the later acts which relate to the use of water by the Upper Basin plants, as we shall see.

3. *The Upper Basin Reservoirs and the steam plants served by them under contracts with the Secretary*

The plants other than Mohave are all in the Upper Basin of the Colorado River. Three storage reservoirs are involved:

(1) Lake Powell, created by Glen Canyon Dam on the main stream, constructed under the authority of the Colorado River Storage Project Act, 43 U.S.C. § 620, et seq., from which water is supplied to the Navajo Plant and will be supplied to the planned Kaiparowits Plant.

(2) Navajo Reservoir, on the San Juan River[22] in New Mexico, which supplies water to the San Juan Plant. The Navajo Dam and reservoir are "participating projects" named in the Colorado River Storage Project Act, *supra,* and, in addition, use of water from that reservoir is controlled by the Navajo-San Juan Chama Project Act, 43 U.S.C. § 615ss(a), (b), which not only requires a contract with the Secretary, but also requires that long-term contracts be approved by special acts of Congress.

[22] The Four Corners Plant, on the San Juan, uses water pursuant to appropriations of natural flow under the laws of New Mexico.

(3) Joe's Valley Reservoir on Seely Creek, a tributary of the Colorado River in central Utah. The reservoir is a part of the Emery County Project authorized by the Colorado River Storage Project Act. Emery County Project water is available for use at the Huntington Plant pursuant to contract among the Emery Water Conservancy District, United States of America, and Utah Power & Light Company.

Three statutes controlling the use of water from government dams are of general application to reservoirs in the Upper Basin. These are (1) the Colorado River Storage Project Act, 43 U.S.C. § 620, et seq., (2) Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), and (3) certain provisions of the Colorado River Basin Project Act of 1968, 43 U.S.C. § 1501, et seq.

4. *The Colorado River Storage Project Act,* 43 U.S.C. § 620, et seq.

This act authorized the Secretary of the Interior to construct and operate four major dams, with power plants, *i.e.,* Glen Canyon, on the mainstream, Navajo on the San Juan, plus two not involved here, Flaming Gorge and Curecanti, and a number of federal reclamation projects which were named as "participating projects," *i.e.,* participating in revenues from the named power plants in assisting repayment of their costs. [23]

[23] Section 620d established a separate fund in the Treasury and directed that all revenues be paid into, and be appropriated out of, that fund for the purposes stated in the act, *e.g.,* retirement of the costs of the participating projects as well as the four main dams and power plants. Excess revenues are to be apportioned among the four States of the Upper Division, Colorado, New Mexico, Utah, and Wyoming, in stated percentages.

The act's purposes were stated to include the initiation of "the comprehensive development of the water resources of the Upper Colorado River . . . storing water for beneficial consumptive use," etc. (Sec. 620.) Section 620c provided that "the Secretary shall be governed by the Federal reclamation laws," and that all uses of water should be "subject to the apportionments of the use of water between the Upper and Lower Basins of the Colorado River and among the States of the Upper Basin fixed in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, and to the terms of the treaty with the United Mexican States."

5. *The Colorado River Basin Project Act of 1968*, 43 U.S.C. § 1501, et seq.

Section 1501 declares:

> "(a) It is the object of this Act to provide a program for the further comprehensive development of the water resources of the Colorado River Basin and for the provision of additional and adequate water supplies for use in the upper as well as in the lower Colorado River Basin."

To that end, the act authorizes the construction of the Central Arizona Project, implements the shortage provisions of the decree in *Arizona* v. *California*, authorizes participation by the United States in the cost of the Navajo Power Plant (discussed separately, *infra* at 34), authorizes planning for the importation of water to augment the supplies of the Colorado River Basin, provides for allocation of costs, creates a development fund into which revenues are to be paid and from which expenditures are to be appropriated, and directs the Secretary to make annual reports of consumptive use throughout the Basin.

Section 1551(b)(2) instructs him to

> "condition all contracts for the delivery of water originating in the drainage basin of the Colorado River system upon the availability of water under the Colorado River Compact."

Section 1551(c) provides:

> "(c) All Federal officers and agencies are directed to comply with the applicable provisions of this Act, and of the laws, treaty, compacts, and decree referred to in subsection (a) of this section, in the storage and release of water from all reservoirs and in the operation and maintenance of all facilities in the Colorado River system under the jurisdiction and supervision of the Secretary, and in the operation and maintenance of all works which may be authorized hereafter for the augmentation of the water supply of the Colorado River system."

This mandatory directive is basin-wide, operating in both the Upper and Lower basins.

Section 1552(a) provides:

> "(a) In order to comply with and carry out the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, and the Mexican Water Treaty, the Secretary shall propose criteria for the coordinated long-range operation of the reservoirs constructed and operated under the authority of the Colorado River Storage Project Act, the Boulder Canyon Project Act, and the Boulder Canyon Project Adjustment Act."

These criteria relate to storage of water in the four storage units of the Colorado River Storage Project, and releases from Lake Powell in a listed order of priority. The effect, in general terms, is to require that

storage in Lake Powell and Lake Mead be kept in balance. [24]

Section 1554 says:

> "Except as otherwise provided in this Act, in constructing, operating, and maintaining the units of the projects herein and hereafter authorized, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902; 32 Stat. 388, and Acts amendatory thereof or supplementary thereto) to which laws this Act shall be deemed a supplement."

Section 1555 directs:

> "Part I of the Federal Power Act shall not be applicable to the reaches of the main stream of the Colorado River between Hoover Dam and Glen Canyon Dam until and unless otherwise provided by Congress."

This reach encompasses the damsites of the controversial Hualapai and Marble Canyon hydroelectric power projects.

This act also authorizes construction of five "participating projects" which had been identified earlier in the Colorado River Storage Project Act. The legislative history of the Colorado River Basin Project Act shows that Congress intended that water be supplied to thermal-electric generating plants from these projects, pursuant to contracts with the Secretary of the Interior. See H.R. REP. No. 1312, 90th Cong., 2d Sess., 3 U.S. CODE CONG. & ADMIN. NEWS 3666 (1968).

We submit that the Colorado River Storage Project Act and the Colorado River Basin Project Act extend

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[24] The operating criteria appear in 35 Fed. Reg. 8951 (1970).

to the entire Colorado River Basin the characterization employed by this Court in the third *Arizona* v. *California* case, 298 U.S. 558, 570 (1936), with respect to the effect of the Boulder Canyon Project Act in the Lower Basin:

> "Without more detailed statement of the facts disclosed, it is evident that the United States, by congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated."

This control is explicitly and repeatedly vested in the Secretary, not the Commission.

6. *The Reclamation Project Act of 1939,* 43 U.S.C. § 485.

It was noted above that the Colorado River Storage Project Act, in Section 620c, and the Colorado River Basin Project Act, in Section 1554, directed that, except as otherwise provided, the Secretary shall be governed by the Federal reclamation laws in constructing, operating and maintaining the works authorized. The element of the Reclamation Laws which controls water and power contracts related to reclamation dams is the Reclamation Project Act of 1939.

Section 9(c) of that act, 43 U.S.C. Sec. 485h(c), authorizes the Secretary to enter into contracts "to furnish water for municipal water supply or miscellaneous purposes," [25] and to enter into contracts of "sale of

[25] "Miscellaneous purposes" has been consistently construed by the Department and Congress to include "industrial purposes," and these, in turn encompass the furnishing of water to thermal-

electric power or lease of power privileges . . . in connection with the operation of any project or division of a project," and specifies minimum revenue requirements, related to operation, maintenance, payment of interest and other fixed charges. It concludes:

> "No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."

It thus delegates to the Secretary authority in the same field as that covered by the surplus water clause of Section 4(e) of the Federal Power Act, as explained by that section's legislative history (*infra* at 55).

7. Special legislation relating to the Navajo Plant, on Lake Powell

The Colorado River Basin Project Act of 1968, 43 U.S.C. § 1523, contained provisions relating particularly to the Navajo Plant. It directed the Secretary to submit to Congress a plan for federal acquisition of an interest in a thermal plant as a source of power for pumping water into and in the Central Arizona Aqueduct, construction of which was authorized by that act, and directed that water used by this plant be debited to the apportionment of 50,000 acre-feet of annual con-

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electric generating plants. *See, e.g.*, Dept. of Interior Memorandum of Associate Solicitor Fisher, October 26, 1956, cited in U.S. DEPT. OF INTERIOR, FEDERAL RECLAMATION AND RELATED LAWS ANNOTATED, VOL. 1, 658, n. 2 (1972) (diversion of water for thermal plant cooling purposes authorized by Reclamation Act of 1939); H.R. REP. No. 1312 (Colorado River Basin Project Act), 90th Cong., 2d Sess. (1968) (discussion of industrial uses of water to be provided by the project included cooling water for power plants at Animas-LaPlata, Dallas Creek and San Miguel).

sumptive use made to Arizona by Article III(a) of the Upper Colorado River Basin Compact, H.R. Doc. 717, 80th Cong., 2d Sess. A169 (1948). The Secretary made the required report September 30, 1969, stating that he intended to acquire 24.3% of the Navajo Plant's capacity for this purpose (Supplement at 106s-108s; 115 CONG. REC. 27585 (1969)). The Secretary, on January 17, 1969, entered into a contract with the Salt River Project Agricultural Improvement and Power District (Supplement at 110s) for water service from Lake Powell for the Navajo Plant, authorizing the diversion of 40,000 acre-feet and consumptive use of 34,100 acre-feet per annum, and in the same year he entered into a "Participation Agreement" with the owners of the plant, acquiring for the United States a 24.3% interest in its capacity for the purposes stated in the Colorado River Basin Project Act. These contracts incorporate detailed environmental controls. (Supplement at 110s). Congress has appropriated $149.5 million through F.Y. 1974, in payment of the federal share (estimated at $200,000,000) of the cost of the plant.[26]

8. *Special legislation relating to the use of water by the San Juan and Four Corners Plants from the Navajo Reservoir.*

It was noted, *supra,* at 29, that the Colorado River Storage Project Act authorized the Secretary to construct the Navajo Dam and Reservoir on the San Juan River in New Mexico. This was supplemented by

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[26] Act of Oct. 16, 1973, Pub. L. No. 93-97, 87 Stat. 318; Act of Oct. 25, 1972, Pub. L. No. 92-405, 86 Stat. 621; Act of Oct. 5, 1971, Pub. L. No. 92-134, 85 Stat. 365; Act of Oct. 7, 1970, Pub. L. No. 91-439, 84 Stat. 890; Act of July 6, 1970, Pub. L. No. 91-305, 83 Stat. 376; Act. of Dec. 11, 1969, Pub. L. No. 91-144, 83 Stat. 323.

the San Juan-Chama Project Act, 43 U.S.C. § 615ii et seq. Sec. 615ss(a) provides:

> "(a) No person shall have or be entitled to have the use for any purpose, including uses under the Navajo Indian irrigation project and the San Juan-Chama project authorized by sections 615jj and 615pp of this title, of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries originating above Navajo Reservoir to the use of which the United States is entitled under these projects except under contract satisfactory to the Secretary and conforming to the provisions of sections 615ii-615yy of this title.
>
> * * * * *
>
> "No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections 615jj and 615pp of this title, shall be entered into for the delivery of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigations that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts."

Sections 615uu(a), (b), and 615vv require the Secretary to comply with all the enumerated elements of the "Law of the River," require the inclusion of stipulations to that effect in all contracts, and give the consent of Congress to suits joining the United States as a party defendant in the event of noncompliance.

As to the San Juan Plant:

Pursuant to the foregoing authority, on April 11, 1968, the Secretary entered into a contract to store and deliver 20,200 acre-feet annually for use by the San Juan Plant, of which the estimated consumptive use was stated as 16,200 acre-feet per annum (Supplement at 123s). This contract was submitted to, and approved by, Congress in the Act of March 22, 1968,[27] which stated these quantities and described the proposed uses as "thermal electric generation."

As to the Four Corners Plant:

On October 10, 1958, the State Engineer of New Mexico granted the Utah Construction and Mining Company a permit (Supplement at 98s) to appropriate the use of the natural flow of the San Juan River to the extent of 51,000 acre-feet annually. Undivided rights in this permit to the extent of water requirements of the Four Corners Plant were assigned to the owners of that plant. The Act of March 22, 1968 (note 27, *supra*), approved a contract between the Secretary and Utah Construction Co. for the storage and delivery of 44,000 acre-feet annually from the Navajo Reservoir, for "Thermal electric generation," but water under that contract has not been made available to the Four Corners Plant.

It is clear that Section 4(e) of the Federal Power Act has no application to the Four Corners Plant, even assuming that that section encompasses steam plants. This is because this plant's uses of water are either (1) uses of natural flow, not stored water, hence, by

[27] Pub.L. 90-272, 82 Stat. 52; 1 U.S. CODE CONG. & ADMIN. NEWS 63 (1968).

hypothesis, not "surplus water . . . from any Government dam," or (2) uses under a contract with the Secretary of the Interior, pursuant to that official's exclusive statutory authority to dispose of the use of water from the Navajo Reservoir, because, if water from Navajo Reservoir becomes available at all to the Four Corners Plant, it will be subject to the contract requirements of the San Juan-Chama Act, 43 U.S.C. § 615ss(a).

C. The decision below should be reversed and vacated as a moot advisory opinion, not applicable to the case before the Court.

In delegating plenary authority to the Secretary of the Interior to dispose of the consumptive use of water stored by federal dams in the Colorado River Basin, Congress has given no indication of an intent that the Federal Power Commission was being invited to stay on as a mother-in-law, cooking in the Secretary's kitchen. The Commission does not seek that nomination. When Congress referred to the Federal Power Commission in Colorado River legislation it did so in connection with hydroelectric projects only. *E.g.*, 43 U.S.C. § 1555. To hold that both the Commission and the Secretary should have power to fix the terms of a contract controlling the consumptive use of water stored by a government dam would, in the language of the Court in *Baker* v. *Carr,* 369 U.S. 186, 217 (1962), quoted with approval in *Gilligan* v. *Morgan,* 413 U.S. 1, 9 (1973), offer:

> "... the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

It was clearly unnecessary for the court below to construe the surplus water clause of Section 4(e) with respect to the Colorado River System. Its construc-

tion with respect to other river systems should await the day when such a case is before the court.

The court's decision should therefore be reversed and vacated as a moot advisory opinion.

Such is the established practice where a decision has been rendered moot by subsequent legislation, to avoid giving it the status of res judicata. *American Public Power Association, et al.* v. *Power Authority of the State of New York,* 355 U.S. 64 (1957), reversing and vacating as moot a judgment of the Court of Appeals for the District of Columbia Circuit, 247 F.2d 538 (1957); *Bryan* v. *Austin,* 354 U.S. 933 (1957); *United States* v. *Alaska S.S. Co.,* 253 U.S. 113, 116 (1920); *Board of Public Utility Commissioners* v. *Cia. General de Tabascos,* 249 U.S. 425 (1919). *Cf. McKay* v. *Clackamas County,* 349 U.S. 909 (1955); *Garcia* v. *Landon,* 348 U.S. 866 (1954); *United States* v. *Munsingwear, Inc.,* 340 U.S. 36 (1950); *United States* v. *Anchor Coal Co.,* 279 U.S. 812 (1929); *Brownlow* v. *Schwartz,* 261 U.S. 216, 218 (1923).

The same rationale requires that an opinion construing a statute which has been superseded by a later act, as in this case, should be vacated to avoid its res judicata status, even though the later statute itself antedated the court's construction of the predecessor act.

D. All of the complainants lack standing to litigate the issue of jurisdiction between the Secretary and the Commission.

1. *Injury in fact to the plaintiff is an element essential to the establishment of his standing to sue.*

The issue for decision in this case (if a decision were to be reached on the merits) is whether the Secretary of the Interior or the Federal Power Commission has

jurisdiction to grant the right, by contract or license, to the consumptive use of water stored by government dams in the Colorado River Basin. None of the complainants could be affected in the slightest by the decision of this issue one way or the other, hence none has standing to litigate it.

The Secretary and the Commission are equally subject to the environmental statutes, *e.g.,* the Clean Air Act, 42 U.S.C. § 1857, the 1972 amendments to the Federal Water Pollution Control Act, 33 U.S.C. § 1251, the National Environmental Policy Act, 42 U.S.C. § 4321. The environmental concerns expressed by the complainants here can be protected in suits under those acts [28] against the one official just as well as in suits against the other.[29]

The Chemehuevi and Cocopah Tribes, being the only complainants owning water rights in the Colorado River, offer these as a special basis for asserting potential injury. Actually, the Law of the River not only completely insulates them from any such possibility, but precludes an attack by them, *qua* water uses, on the use of water by any of the six power plants.

The decree in *Arizona* v. *California,* 376 U.S. 340 (1964), awarded, of the first 7,500,000 acre-feet of consumptive use of main stream water available for release from Hoover Dam, 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada (Art. II(B)(1)).

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[28] For example, all of the complainants except the two tribes were plaintiffs in the *Jicarilla* environmental case against the Secretary of the Interior.

[29] See the environmental provisions contained in the water use contracts on file with the Court.

The Chemehuevi uses are part of the decreed apportionment to California. Those of the Cocopah are part of the decreed apportionment to Arizona. Article II (D)(1), (2) of the decree awards "present perfected rights" (defined in Article I(G), (H)) to

> "(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 11,340 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;
>
> "(2) The Cocopah Indian Reservation in annual quantities not to exceed (i) 2,744 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 431 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of September 27, 1917;"

These rights are of such high priority, and the quantities are so small in comparison with the quantities apportioned to the respective States, that in no conceivable circumstances could use of water by any water user in any State cause shortages to the Chemehuevi or Cocopah Tribes. Article II(B)(3) fully protects these present perfected rights in the event of shortage.

Beyond this, legislation implementing the decree makes it doubly certain that shortages, if any, shall be borne by others than holders of present perfected rights. Colorado River Basin Project Act, 43 U.S.C. § 1521(b).

By the same token, the use of water by the Mohave Plant, in Nevada, is shielded by Article II(B)(1) of the decree from attack by users in other States of the Lower Basin, including the Chemehuevis in California and the Cocopahs in Arizona. This is because the use by the Mohave Plant is within the 300,000 acre-feet apportioned to Nevada by that article, and is made pursuant to contracts of the Secretary (Supplement at 99s) executed pursuant to the requirement of such contracts stated in Article II(B)(5).

Both the Secretary and the Commission are included in the injunction imposed by Article II against releases otherwise than in accordance with the decree.

Nothing that either the Secretary of the Interior or the Federal Power Commission might do or refuse to do could diminish or enlarge the decreed rights to use of water held by the Chemehuevi or Cocopah Reservations, or, for that matter, the decreed water rights of Nevada, used in operation of the Mohave Plant, attacked by these complainants.

The Colorado River Compact is a positive bar to any complaint by these tribes against the use of water by any of the five plants in the Upper Basin.

That compact, in Article III(a), provides:

> "(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

Article III(d), (e) provides:

> "(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.
>
> "(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

Uses of water by the five plants in the Upper Basin are within the compact entitlement of the Upper Basin. The exercise of these apportioned rights cannot give rise to actionable injury to any water user in the Lower Basin. Such is the very purpose of the compact. This is in addition to the fact that, in view of the guarantee of water to the Lower Basin in Article III(d), no use by these plants could conceivably cause shortages to those tribes. The guaranteed supply, averaging 7,500,000 acre-feet annually, is over 500 times their total decreed diversion rights and thus over 1,000 times their decreed consumptive use requirements.

Consequently, as in the case of the Lower Basin Mohave Plant, a decision as between the licensing authority of the Secretary or that of the Commission, with respect to the five power plants in the Upper Basin, could not affect the water rights of the Chemehuevi and Cocopah Tribes. Lacking injury, they lack standing to demand that the water rights of the five Upper Basin plants be conditioned on issuance of Federal Power Commission licenses to use surplus water.

II.

THE RATIONALE OF THE COURT'S PROPER "PROJECT WORKS" HOLDING SHOULD HAVE CONTROLLED ITS DISPOSITION OF THE "SURPLUS WATER" ISSUE.

A. The text of the act plainly relates only to hydroelectric projects, to the exclusion of thermal plants, regardless of the source of the water that they use.

Steam-electric power generation cannot be made to fit the Procrustean bed of a statute wholly designed to regulate the development of water power, the Federal Water Power Act.

The act, in terms, (1) relates the Commission's licensing jurisdiction only to hydroelectric projects, not thermal projects, and (2) makes no exception of thermal plants using surplus water from government dams.

The lower court concedes the major premise (App. 73):

> "We agree with intervenors that it is unlikely that, if Congress had intended to include the regulation of thermal-electric generation as a basic purpose of the Act, it would have limited reference in the preface to hydroelectric power—the lesser utilized of the two sources of electric power generation. The explicit reference to only hydroelectric power is consistent with the legislative history of concern with promoting the 'comprehensive development of water power.'" (Footnotes omitted.)

The court goes on to say "[o]ther provisions of the Act bear this out," and catalogues Section 4(a), 16 U.S.C. Sec. 797(a), and Section 24, 16 U.S.C. Sec. 818, which, it says, "single out" water power and water-power development for study and planning.

The statute, in addition to these, contains a long list of paragraphs which are identified with the use of

water power, never with thermal power, and so of course never making a distinction between thermal plants using water from navigable streams and thermal plants using surplus water from government dams. All are outside the statute.

For example:

The definitions of "project," and "project works," in Section 3(11) and (12), are in terms which the court held excluded thermal power plants which use water of navigable streams, and included only hydroelectric projects (App. 75). Examination of the language of paragraph (11) shows it equally inapplicable to the identification of *all* thermal power plants. The references are all keyed to the works which carry water under pressure down to and through the turbines, propelled by this pressure, and the control equipment for these hydraulic works. Had it been intended to include steam plants using surplus water from a government dam in the scope of the Water Power Act, a definition of the elements of a thermal power plant (*e.g.*, boilers, steam turbines, condensers, fuel handling and ash disposal facilities, railroad yards, etc.) would have been as essential as a definition of the elements of a hydroelectric plant. "Project" and "project works" are terms of art, reappearing throughout the act. Insofar as hydraulic features of a thermal plant are concerned, they are the antithesis of those of a hydroelectric project. The steam plant's water system is keyed to pumps, not turbines, lifting water uphill, not directing it downhill, for consumption in conversion of energy supplied by fuels, not by falling water.

The text of the act is consistent in its focussing on water power. See, in addition to the sections cited by

the court, Section 4(f) in conjunction with Section 9 (preliminary permits), Section 4(g) (orders to conserve and utilize the navigation and water power resources of the region), Section 10(a) (comprehensive plans for improvement and utilization of water power development), Section 10(b) (any dam or project works), Section 10(c) (maintenance of project works in a condition of repair adequate for the purposes of navigation), Section 10(e) (payment for the development and utilization of power created by any government dam), Section 10(f) (payments for benefits to a project not under license, occasioned by an upstream dam), Section 12 (protection of interests of navigation), Section 13 (inclusion of locks), Section 14 (right of U.S. to take over a project, including locks), Section 18 (maintenance of navigation aids, fishways, etc.), Section 21 (power of eminent domain over property necessary for a dam, reservoir, diversion structure, and appurtenant works, if justified for improving or developing a waterway), and so on.

It would be remarkable to discover, latent in one subsection, an unspoken intent that the act encompass use of water in one kind of thermal plant (excluding all others), whereas all other sections of the act which refer to use of water for power purposes do so in terms which make sense only if they are related to hydroelectric development of a waterway.

The quantities of water diverted and used by a steam plant in boilers and cooling apparatus are miniscule compared to the quantities required by a hydroelectric project generating the same quantity of power, and Congress, concerned with the development of water

power, had no reason to concern itself with the insignificant quantities of water used by thermal plants.[30]

B. The opinion below conflicts with decisions made by Congress in 1935 in amending the Federal Water Power Act.

In 1935 the Water Power Act was amended by Title II of the Public Utility Act of 1935 and was made Title I of the Federal Power Act. The 1935 Act added Titles II and III to the Federal Power Act to regulate the interstate transmission and sale of electricity. In the course of considering amendments, Congress made several decisions relevant to the present case.

1. In 1935, two bills, H.R. 5423, and S. 1725, were introduced which proposed to require public utilities to obtain certificates of public convenience and necessity for the construction of transmission and production facilities. Section 204(a) of both bills stated as follows:

> "Sec. 204. (a) No public utility shall undertake the construction or extension of any facilities . . ., or engage in production or transmission by means of any such new or additional facilities . . . unless and until there shall first have been obtained from the Commision a certificate that the present or future public convenience and necessity require or will require such new construction . . . ."

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[30] For example, the Glen Canyon Dam power plant, with the reservoir at normal operating elevation, is capable of generating 1,092 megawatts of power by passing 28,000 cubic feet of water per second through the turbines. In comparison, the Navajo steam plant, using boiler and cooling water from the same reservoir, consumes only 47 cubic feet per second (34,100 acre-feet per year) in generating 2,310 megawatts of power by burning coal. Each megawatt produced by steam at Lake Powell thus requires availability of less than one tenth of one percent of the water required to produce each megawatt by the hydroelectric power plant there.

The scope of the certification provision, over steam plants and transmission lines used in interstate commerce, was explained during committee hearings:

> "The CHAIRMAN: Let me ask you a question right there: It has been stated to me that in event some power company desired to build a plant, a transformer, or something of that kind, within a State, particularly another plant in a State, that this would give the Federal Power Commission the right to say that they would not be allowed to do it. What about that?
>
> "Mr. DEVANE: If it was a facility used in connection with the transmission of energy in interstate commerce, this bill does require such a company to come to the Commission for a certificate of convenience and necessity. If it is a facility that is used solely for the producton of energy used in intrastate commerce, they would not have to come. There is an effort to secure control of the construction or the abandonment of facilities used in interstate commerce." *Hearings on Public Utility Holding Company Act of 1935 Before the Senate Comm. on Interstate and Foreign Commerce,* 74th Cong., 1st Sess. 249-50 (1935); *see also* the testimony of Dozier DeVane, FPC Solicitor, *id.* at 257-59.

The Commission proposal was viewed with alarm. As one Senator said, "this business of telling people whether they shall operate a plant . . . . [t]hat is the dangerous thing, to my mind." *Id.* at 259.

The proposal to extend jurisdiction over "production facilities," including steam plants, was not accepted by Congress. S. REP. No. 621 (S.2796), 74th Cong., 1st Sess. 20 (1935).

The significance of this proposed amendment, and its rejection, is clear. If Congress rejected the notion that

steam plants should be subject to certification procedures in Title II of the new Federal Power Act, it did not intend to subject those same plants, as "project works" or users of "surplus water," to the licensing procedures of Title I of the Act, embodying the Federal Water Power Act.

2. Section 10(e), 16 U.S.C. § 803(e), which relates to charges payable by licensees, was amended in 1935 by adding a proviso referring to dams or structures in reclamation projects, requiring, in such case, the approval of the charges by the Secretary, and, in the case of such structures on tribal lands, the approval of the Indian tribe, subject to readjustment of charges at the end of 20 years and each 10 years thereafter. Use of surplus waters from reclamation dams by hydroelectric projects had always been subject to charges under the Federal Power Act. The new feature was requirement of approval by the Secretary. The receipts continued to go into the Treasury, for allocation under Section 17 of the Federal Power Act, 16 U.S.C. § 810, among various funds and beneficiaries. All this was changed, as to the Colorado River Basin, by Section 5 of the Colorado River Storage Project Act, 43 U.S.C. § 620(d), and Section 403 of the Colorado River Basin Project Act, 43 U.S.C. § 1543, which direct that revenues collected in connection with all Upper Basin dams and water contracts involved here should be allocated among funds and beneficiaries quite different from those named in the Federal Power Act. Revenues received by the Secretary from the Mohave Plant's use of water, in the Lower Basin, are controlled by Section 2 of the Boulder Canyon Project Adjustment Act, 43 U.S.C. § 618a, enacted in 1940.

3. Congress adopted an amendment to Section 10(f) in 1935 which negates the lower court's assumption that the existence of an upstream government dam imposes the requirement of a license on downstream power plants benefited thereby.

Section 10(f), 16 U.S.C. § 803(f), as amended in 1935, provides otherwise, even with respect to hydroelectric projects:

> "Whenever any power project *not under license* is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of *such unlicensed project*, shall determine and fix a reasonable and equitable *annual charge to be paid* to the licensee or permittee on account of such benefits, or *to the United States if it be the owner of such headwater improvement.*" (Emphasis added.)

The consequence that the statute imposes on the downstream power plant benefiting from a government upstream dam is *not* the necessity for acquisition of a "surplus water" license, but the necessity of paying for the benefits thus received by this "unlicensed project." There could not be such a thing as an unlicensed project "benefited by the construction work of . . . the United States," if the opinion below were correct.

So far as we have found, in only one case in 54 years has the Commission undertaken to invoke the surplus water clause of Section 4(e) with respect to such downstream plants, even for licensing of a hydroelectric project, and in that case this same court of appeals set the Commission's order aside. It did so independently of the 1935 amendment.

In *California Oregon Power Co.*, 13 F.P.C. 1, 4 (1954), 15 F.P.C. 14 (1956), the Commission asserted licensing jurisdiction over certain hydroelectric plants (two of which were 57 and 59 miles downstream from a government dam). In our case the court quotes with apparent approval from the 1954 FPC decision in that case (App. 99):

> "Where there is available stored water not to be used in irrigation, which represents storage over and above that needed for irrigation, and which would otherwise flow unused down the main channel of the stream, that water is 'surplus water,' and, if used for power development, would require a license from this Commission."

But this same court, in *California Oregon Power Co. v. FPC*, 239 F. 2d 426 (D.C. Cir. 1956), dismissed a petition for review of that FPC decision because of lack of a justiciable controversy (these being navigable waters, thus affording "admitted jurisdiction"). In doing so, it expressed its skepticism about the Commission's definition of "surplus waters," quoted above, which the same court now embraces:

> "... even counsel for the Commission is uncertain that this definition is correct.
>
> * * * * *
>
> "The record is, in fact, in such a state that we could hardly hold (if we reached the question) that Copco has been shown to be a user of surplus water, on any theory." *Id.* at 432.

Nevertheless, the court in the present case appears to have adopted, with respect to *steam* plants, the jurisdictional basis that it declined to adopt in the earlier case, with reference to *hydroelectric* plants, *i.e.*, use of water flowing in a stream below a government dam.

C. Prior construction of the Federal Power Act by this Court removes any doubt as to the act's inapplicability to the licensing of fossil-fuel steam plants.

Years ago, this Court recognized that the Act was "distinctly an effort to provide federal control over and give federal encouragement to water power development." *First Iowa Hydro-Electric Cooperative v. FPC,* 328 U.S. 152, 180 n. 23 (1946). In another decision, the Court stated:

> "the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties." *FPC v. Niagara Mohawk Power Corp.,* 347 U.S. 239, 251 (1954).

Against this background of judicial recognition of the scope of the Federal Power Act, the Court decided the *Taum Sauk* case, *FPC* v. *Union Electric Company,* 381 U.S. 90 (1965). There, the Court held that a pumped storage project, as a hydroelectric facility not affecting a navigable stream but affecting interstate commerce, was subject to FPC jurisdiction. In disposing of the company's arguments seeking to avoid federal jurisdiction, the Court addressed the company's argument "that an anomalous consequence flows from the Commission's construction of the Act and its view that steam plants generating large amounts of energy for interstate transmission are not within the scope of § 23(b). . . ." 381 U.S. at 109. The argument was that since jurisdiction over a pumped storage project rested on the interstate transmission of energy, "there can be no basis for distinguishing between a steam plant and a hydroelectric facility both generating energy for interstate use." *Id.* at 109-10. The Court had little difficulty in disposing of this argument.

> "The answer to this conundrum is that unlike Part II [of the Act], under which the Commis-

> sion regulates various aspects of the sale and transmission of energy in interstate commerce, Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydro electric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." *Id.* at 110 (footnote omitted).

The dissenting Justices agreed:

> "The legislative history here, however, establishes to my satisfaction that it has required licenses of neither steam plants nor the type of hydroelectric plant here involved. . . ." *Id.* at 115.

Certainly, steam plants using "surplus water" cannot be carved out as an exception to the Court's rationale.

D. The administrative construction of the act, reported to Congress for more than a half-century, has consistently related the Commission's licensing jurisdiction solely to hydroelectric power, with no exception for thermal plants using surplus water from government dams.

In 1921, in its first annual report, the FPC noted that "the Commission is limited to the consideration of projects designed to produce water power."[31] This has been the consistent Commission policy ever since. As recently as 1972, FPC Chairman Nassikas testified that:

> "Except for our hydroelectric licensing authority, we do not license any generating facility. While the Atomic Energy Commission licenses nuclear

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[31] FPC, First Annual Report 138, 155 (1921).

> steam generating plants, there is no Federal licensing currently of fossil fuel steam generating plants. . . .
>
> * * * * *
>
> "Part I licensing procedures do not apply to the licensing of fossil or thermal electric generating facilities." [32]

In the meantime, Congress had several times received similar expressions from the Commission,[33] other agencies of the executive branch, and interested parties [34] (including the Sierra Club), and, as the court below recognized, had amended the act on several occasions (App. 76). It is not only significant, as the court below recognized, that Congress expressed no dissatisfaction with this administrative construction; it is also significant that in none of these dialogues between the Commission and Congress did either of them suggest the notion that while thermal plants using the waters of a navigable stream were excluded from the Commission's licensing jurisdiction, these same thermal plants were nevertheless included in that jurisdiction, if a government dam were located upstream.

The court of appeals recognizes that the Commission's consistent administrative construction has been

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[32] *Hearings on Interim Nuclear Licensing Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. 249, 261 (1972).

[33] 1962 FPC ANNUAL REPORT, 12-13; 1966 FPC ANNUAL REPORT, 8-9; I FPC NATIONAL POWER SURVEY 100-01 (1964).

[34] *E.g.*, Interior Department, Office of Science and Technology, EPA, AEC. *Power Plant Siting and Environmental Protection, Hearings Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. (1971).

that "the Commission is limited to the consideration of projects designed to produce water power" (App. 74); that this consistent administrative interpretation is entitled to "great weight," *Udall v. Tallman,* 380 U.S. 1 (1965); *Power Reactor Development Co. v. International Union,* 367 U.S. 396 (1961), and that this is particularly true, having been an interpretation given in the initial implementation of the act, communicated to Congress; and that Congress, in repeated amendments of the act, "gave no hint of congressional desire to override the Commission's construction of the scope of its jurisdiction" (App. 76).

The Commission's administrative construction has never suggested the distinction made by the court below. There is no justification for reading into it an exception that is not there.

III.

THE LEGISLATIVE HISTORY OF THE FEDERAL WATER POWER ACT PROVES THAT CONGRESS AUTHORIZED THE FPC TO REGULATE ONLY HYDROELECTRIC UTILIZATION OF SURPLUS WATER FROM GOVERNMENT DAMS, AND THAT CONGRESS SPECIFICALLY REFUSED TO INCLUDE IN THE WATER POWER ACT PLENARY AUTHORITY OVER OTHER WATER USES.

A. Early legislation, bills leading to enactment of the Federal Water Power Act, and congressional debates all show that Congress was only concerned with use of surplus water in generating hydroelectric power.

For the Court's convenience, we have submitted a separately bound Supplement to our brief containing a detailed account of legislative history. The following is a summary.

The legislative history of the surplus water clause, and its common meaning and usage both prior to, and

subsequent to, enactment of the Federal Water Power Act reveal that the Act's jurisdiction extended solely to hydro power.[35] The congressional debates, discussions, committee reports, and proposed bills mention "surplus water" *only* in the context of hydroelectric generation. Reference to utilization of surplus water in Section 4(e) and Section 10(e) of the Act, or their earlier counterparts, was always in relation to water power, and nothing else. The idea of conferring on the Commission licensing jurisdiction over the utilization of surplus water for irrigation, domestic water supply, steam plants, or other consumptive uses was never advanced. When irrigation was mentioned, it was in the context of preserving states rights versus the federal government and avoiding impairment of irrigation opportunities. When steam power was mentioned (as it was) it was in the context of steam plants as unlicensed competition with licensed water power projects,[36] consuming coal which could be conserved and replaced by hydro power.

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[35] The history will show that often the terms "surplus water" and "water power" were intertwined. The discussions of both expressions seem to assume a benefit to the licensee derived from the change in the elevation of the water surface made by the dam, rather than a change in the regimen downstream. What is clear is that both expressions related only to hydroelectric generation. A distinction between leases of government-owned facilities and leases of surplus water appeared in 1928 in Section 6 of the Boulder Canyon Project Act, 43 U.S.C. § 617(e).

[36] *E.g.*, 51 CONG. REC. 12336, 12593, 12777 (1914); 53 CONG. REC. 2640, 10450 (1916); 56 CONG. REC. 8931, 9282 (1918); 59 CONG. REC. 1101, 1430, 1473 (1920); *Hearings on S. 1119 Before the House Committee on Water Power*, 65th Cong., 2d Sess. 166-83 (1918).

Statutes involving surplus water, 1888-1914

In early years, Congress passed three types of statutes[37] dealing with regulation of hydroelectric development. These, as noted in a speech made on the Senate floor in 1913 related to: (i) "dams constructed by acts of Congress where surplus water, not needed for navigation, has been leased for water power purposes"; (ii) "where dams, or dams and locks, are to be constructed in the future by the Government, the water power created incidentally thereto shall be leased under the direction of the Secretary of War"; and (iii) "acts of Congress granting permission to lessees to construct dams in navigable streams subject to various conditions." 49 CONG. REC. 2601-03 (1913) (remarks of Senator Burton). Under these acts, licenses were issued on a project by project basis.

The earliest legislation[38] involving lease of surplus water was an appropriations act for rivers and harbors in 1888. Act of August 11, 1888, ch. 860, 25 Stat. 400. The following provision was made:

> "[T]he Secretary of War is hereby authorized and empowered to grant leases or licenses for the use of the *water powers* on the Muskingum River at such rate and on such conditions and for such periods of time as may seem to him just, equitable,

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[37] See S. Doc. No. 57, 62d Cong., 1st Sess. (1911), for a listing of early statutes involving government dams.

[38] Perhaps the earliest mention of "surplus water" is in a deed of property on the Fox River in Wisconsin to the United States by the Green Bay and Mississippi Canal Co. between 1870 and 1872. The deed is cited but not quoted in Kaukauna Water Power Co. v. The Green Bay & Mississippi Canal Co., 142 U.S. 254, 259 (1891).

and expedient: *Provided,* That the leases or licenses shall be limited to the use of the *surplus water* not required for navigation." *Id.* at 417 (emphasis added).

From 1890 through 1909, Congress enacted seven more statutes,[39] containing similar language, for the lease of surplus water for power development. These statutes, comprising the basis of the comprehensive water power bill discussions commencing in 1914, culminating in the 1920 Act, have a common thread. The historical usage of the term "surplus water" applied only to the development of water power.[40] This principle continued, and was not altered in the many proposed bills, amendments, and discussions leading to the enactment of the comprehensive water power act. Congress considered new legislation "in view of the provisions of the legislation already enacted," and effect should be given to them. *St. Louis, Iron Mountain & Southern Ry. Co. v. United States,* 251 U.S. 198, 207 (1920).

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[39] These statutes were:

Act of Sept. 19, 1890, ch. 907, 26 Stat. 426, 447 (Green and Barren Rivers); Act of June 13, 1902, ch. 1079, 32 Stat. 331, 358, *as amended,* Act of June 28, 1902, ch, 1299, 32 Stat. 408, 409 (Cumberland River); Act of March 6, 1906, ch. 517, 34 Stat. 52 (Muscle Shoals); Act of April 23, 1906, ch. 1660, 34 Stat. 130 (Bear River); Act of May 9, 1906, ch. 2438, 34 Stat. 183, 184 (Coosa River); Act of June 25, 1906, ch. 3530, 34 Stat. 456, 457 (Study Commission); Act of March 4, 1907, ch. 2912, 34 Stat. 1288 (Coosa River, Lock Twelve); Act of March 3, 1909, ch. 264, 35 Stat. 815, 819 (Wabash River).

[40] That is, to power created by use of the kinetic energy of falling water.

Legislative proposals, 1914-1915 (63d Congress)

In 1914, Congress considered for the first time legislation to regulate water power in a comprehensive manner, as opposed to the earlier piecemeal regulation of individual projects and private licenses. Two bills, the Adamson bill, H.R. 16053, dealing with control of power on navigable streams, and the Ferris bill,[41] H.R. 16673, dealing with water power development on public lands, were introduced.

Section 14 of the Adamson bill contained a provision dealing with surplus water, which, as introduced and reported to the House floor read:

> "That the Secretary of War, upon the advice and with the approval of the Chief of Engineers, may lease to any applicant having complied with the laws of the State in which the dam is constructed or to be constructed by the United States, *the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant,* and owned by the United States, and on such terms as may be deemed by the Secretary of War, and Chief of Engineers for the best interests of the United States, and in awarding such lease preference shall be given to the applicant whose plans are deemed by any action of Congress or by the Secretary of War and Chief of Engineers to be best adapted to conserve and utilize in the public interest the *navigation and water power resources of the region,* and all such leases and the parties

[41] As with all public lands bills, the Ferris bill contained no mention of surplus water. H.R. REP. No. 842, 63d Cong., 2d Sess. (1914).

thereto and the terms and conditions thereof shall be reported annually to Congress." 51 CONG. REC. 11415 (1914) (emphasis added).

The report of the House Committee on Interstate and Foreign Commerce explained that:

> "Section 14 is a new section authorizing the Secretary of War, with the approval of the Chief of Engineers, to lease to any applicant who has complied with the laws of the State in which the dam may be located any surplus power developed by a dam that is constructed or owned by the United States for the purposes of navigation." *Id.* at 11070.

Remarks of congressmen during discussion of Section 14 support the view that only water power uses of surplus water were to be regulated. Congressman Mann stated:

> "We have many navigation dams in the United States. At many of them *there is surplus water which may be used for the development of water power,* and we authorize the Secretary of War to *lease that surplus water power* and to make charges for it." *Id.* at 11403 (emphasis added); see *id.* at 12330 (remarks of Mr. Lenroot).

And Congressman Brown, in extended remarks concerning Section 14, stated:

> "Section 14 is entirely in keeping with the rest of the bill. It permits the Secretary of War and the Chief of Engineers to lease the right to develop power from the surplus water flowing over any dam, present or future, for any length of time, with or without consideration." *Id.* at 768 (Appendix).

Congressman Stevens of New Hampshire offered an amendment to H.R. 16053. The surplus water

clause in this amendment[42] closely resembles the language adopted in the Federal Water Power Act. *Id.* at 13256-60. The debate surrounding the Stevens amendment shows that the House did not propose to reach non-hydro-power uses with the "use of surplus water" language. The author explained the effect of his proposed amendment on Section 14:

> "[T]he only substantial change made in section 14 by the amendment which I have offered is that no lease of water-power rights to anyone shall be for a longer period than 50 years.
>
> ". . . no *lease of water-power* rights which belong to the Government should be given in perpetuity to any corporation, private or public." *Id.* at 13257 (emphasis added).

Congressman Adamson, the sponsor of H.R. 16053, reacted to the Stevens amendment:

> "[I]f the committee [referring to the House] thinks that it is more likely to serve the purpose intended, it is all right with me. I can not see any difference." *Id.* at 13256.

The Stevens substitute to Section 14 was agreed to by the House on August 4, 1914, *id.* at 13260, the date the Adamson bill was approved. *Id.* at 13276. The bill was sent to the Senate, whereupon it was referred to the Committee on Commerce on August 5, 1914, *id.* at 13296, which reported a substitute bill, S. 6413, on which no action was taken. S. REP. No. 846, 63d Cong., 3d Sess. (1914).

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[42] "That the Secretary of War be, and he is hereby, authorized to enter into leases for the use of surplus water and water power generated at dams and works constructed wholly or in part by the United States. . . ."

Legislative proposals, 1916 (64th Congress)

The scope of the surplus water clause was not altered in the congressional activities in 1916. Congress primarily considered two bills in 1916, the Ferris bill [43] in the House, and the Shields bill, [44] S. 3331 in the Senate. The Shields bill contained the following language concerning utilization of government dams:

> "Sec. 10. The Secretary of War may lease . . . *the right to utilize the surplus water power over and above that required for navigation at any navigation dam now or hereafter constructed,* either with or without contribution by the applicant, and owned by the United States . . . ." 53 CONG. REC. 2198 (1916) (emphasis added).

Although the term "surplus water" is not expressly included in S. 3331, it is apparent from the debates that Section 10 [45] was intended to incorporate surplus water in the term "surplus water power." Senator Shields explained the provision of his bill in the following manner:

> "Under Section 10 . . . provision is made for payment of the excess of water arising from dams built solely by the Government. . . ." *Id.* at 3064.

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[43] H.R. 408 dealt with public lands, and contained no reference to surplus water.

[44] In the 65th Congress, S. 1419 was also known as the Shields bill.

[45] The Senate committee report contains the following summary of Section 10, which indicates that the term "surplus water power" includes the concept of leasing surplus water, and that the section is limited to taking advantage of water power at government dams and does not extend to any other use of federal projects:

> "The bill also provides for the lease of water power in excess of that needed for operation and navigation facilities, incidentally produced by dams heretofore or which may be hereafter constructed by the United States in the improvement of navigable rivers. . . ." S. REP. No. 89, 64th Cong., 1st Sess. 4 (1916).

S. 3331 passed the Senate with Section 10 virtually unchanged. However, the House Committee on Interstate and Foreign Commerce struck out the entire bill and substituted a new bill. Section 19,[46] relating to the use of government dams stated:

> "Sec. 19. That the Secretary of War be, and he is hereby, authorized to enter into leases for the use of surplus water and water power generated at dams and works constructed wholly or in part by the United States in the interests of navigation. . . ." H.R. REP. No. 404, 64th Cong., 1st Sess. 6 (1916).

The House report explained that Section 19 was limited to the leasing of power created at federal dams, as had been the case for many years:

> "Section 19 regulates the method to be pursued by the War Department in *leasing the power* at dams erected in whole or in part by the Government itself. It contains substantially the same provisions passed by the House two years ago *and continues the method existing as to Government dams for many years, under which the War Department has satisfactorily regulated and leased surplus water at a number of such structures.*" *Id.* at 11 (emphasis added).

The language indicates that the purpose of the "surplus water" clause was to systematize a procedure which had been carried on in a piecemeal manner for many years. Plainly, the House intended the clause only to apply to such uses of surplus water as had been licensed in the past, *i.e.*, water power projects at federal dams.

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[46] The section is identical to Section 14 of H.R. 16053 as passed by the House in 1914.

At the close of this session, Congress had before it two bills concerning the use of government dams. The Shields bill, S. 3331 (Section 10), referred to "surplus water power" while the House substitute bill (Section 19) referred to "surplus water and water power." To Congress, both clauses meant the same thing. For example, Congressman Kent, in analyzing the Senate bill and the House substitute, interpreted the Senate bill, which contained the language "surplus water power" but not "surplus water," as follows:

> "The Secretary of War may lease, on such terms as he may provide, the right to develop power from surplus water at dams owned by the United States and where the cost of construction is borne by the United States or jointly with lessee." 53 CONG. REC. 1559 (Appendix) (1916).

In discussing the House substitute (which used the term "surplus water"), Kent stated the appropriate section:

> "[p]rovides that Secretary of War is authorized to lease surplus water and water power generated at Government dams for not to exceed 50 years upon terms provided by the Secretary, with periodical readjustment of rentals."[47] *Id.*

Obviously to Congressman Kent, and surely to other members of Congress, the two bills applied to the same subject—utilization of the hydroelectric potential of government dams. The principle remained unchanged in Congress next session.

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[47] Mr. Kent submitted a comparative analysis, section by section, in the Congressional Record. 53 CONG. REC. 1558-60 (Appendix) (1916).

Legislative proposals, 1918 (65th Congress)

In 1918, the Senate passed S. 1419 (the Shields bill), which contained a provision on surplus water identical to the wording of Section 10 of S. 3331 of the previous Congress, indicating the Senate's intent concerning the use of federal dams had not changed. The Senate report summary of Section 10, S. REP. No. 179, 65th Cong., 2d Sess. 4 (1917), is identical with the report in the previous session.

The House Committee on Water Power considered a substitute bill, a Wilson administration proposal, which for the first time included public lands and navigable waters in the same bill. In Section 4(d) of the substitute as introduced in committee, which is now Section 4(e), the Federal Power Commission was authorized:

> "To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation, State or municipality, for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, or in any of the navigable waters of the United States or upon any part of the public lands and reservations of the United States (including the Territories), *or for the purpose of utilizing the surplus water or water power over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant, and owned by the United States,* which licenses shall be irrevocable, except as herein pro-

vided . . . ." H. REP. No. 715, 65th Cong., 2d Sess. 23 (1918) (emphasis added).[48]

The bill as reported by the Committee on Water Power to the House floor contained one amendment relating to the "surplus water" clause. The clause was amended to read:

> ". . . or for the purpose of utilizing the surplus water or water power *from any navigation dam* . . . ." *Id.* at 3 (emphasis added).

The word "at" was changed to "from"[49] and the phrases "over and above that required for navigation" and "now or hereafter constructed either with or without contribution by the applicant, and owned by the United States" were struck from the clause. This deletion, however, does not indicate that the definition of surplus water had been changed.

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[48] Three features about this section are worth noting. First, the authority to lease surplus water is combined with the authority to license project works. Heretofore, regulation was pursuant to separate sections.

Second, the conjunction "or" is used between the terms "surplus water" and "water power" instead of "and" as in previous bills. It is not clear why this change was made, but there is no historical authority for concluding that the alteration of language indicates an intent of Congress to expand the Commission's licensing jurisdiction over surplus water.

Third, the language of the "surplus water" clause indicates that the definition had not been changed since the early bills. Surplus water is still computed by deducting that amount of water needed for navigation from the total quantity of water flowing at the dam.

[49] Changing the term "at any navigation dam" to read "from any navigation dam" did not alter the meaning of surplus water. The term "from" was equated as identical in meaning with surplus water "generated from" or "created from" a government dam. *Hearings on S. 1419 Before the House Committee on Water Power*, 65th Cong., 2d Sess. 395-96 (1918).

An amendment to Section 10(e) reveals that charges for the use of a navigation (government) dam were to be for the "utilization of power" created by the dam. Thus:

> "but in no case shall a license be issued free of charge for the development and utilization of power created by any navigation dam and that the amount charged therefor in any license shall be as nearly as possible that ascertained by the commission to be the value of such power." *Id.* at 7.

Clearly, the charge was to be only for the "value of such power," and not the value of water for consumption by irrigation, domestic, or steam plant uses.

The Committee on Water Power held extensive hearings on the substitute bill in 1918, and the 900 pages or so of testimony show that Congress was only concerned with development of the Nation's water power resources.[50] In response to questioning concerning non-power uses of water, Mr. Merrill, principal draftsman of the substitute bill, said:

> "Mr. MERRILL. . . . This bill is concerned only, in such instances, in the development of power. When that is done the licensee may make any other use that is available.
>
> "Mr. RAKER. But the bill simply gives him a license for power purposes?
>
> "Mr. MERRILL. Yes."
>
> *Hearings on S. 1419 Before the House Committee on Water Power,* 65th Cong., 2d Sess. 89 (1918).

[50] One argument for developing water power, repeatedly made, was that it would conserve coal, oil, and gas used by steam plants. *E.g.*, 56 CONG. REC. 276, 283, 9112, 9313 (1918). Manifestly, the bill did not have as its purpose development of projects to supply water for expansion of the use of these fuels in steam plants, but to foster the use of substitute water power.

Congressman Raker was concerned about the fact that the bill lacked any provision for the development of irrigation:

> "Mr. RAKER. Are you so sure that there ought not to be a provision in here so that arrangements could be made to handle that?
>
> "Mr. MERRILL. I do not think it is necessary at all. I do not see how there can be any question about it whatever. *The only thing this bill is doing is to grant a license for that particular power development occupying the public lands.* There is no assumption of any control whatever over any other uses the licensee may make of that water outside of that development." *Id.* at 89-90 (emphasis added).

An exchange between Congressman Taylor and Mr. Townley, assistant to the president of the Westinghouse Electric and Manufacturing Company, expressly indicates that steam plants were to be excluded from the bill:

> "Mr. TAYLOR. You have spoken about the handicaps that are against water power development as compared with steam. The steam plants are not subjected—or will not be subjected, generally speaking—to the governmental regulations that this bill provides for will they?
>
> "Mr. TOWNLEY. No, sir.
>
> "Mr. TAYLOR. And they will not be subjected either to the payment of Federal royalties?
>
> "Mr. TOWNLEY. No, sir."
>
> *Hearings on S. 1419 Before the House Committee on Water Power,* 65th Cong., 2d Sess. 179 (1918).

The substitute bill was passed by the House, and referred to a conference committee. The conference

report proposed no changes from the House substitute in the wording of Section 4(d), except for the substitution of the word "Government" for "navigation," with respect to federal dams.[51] The report was not acted upon.

Legislative proposals, 1919-20 (66th Congress)

A bill (H.R. 3184) which substantially corresponded to the House substitute bill considered in the previous session, as amended in conference, was introduced in the House of Representatives. No hearings were held on H.R. 3184, since Congress merely continued the unfinished business of the 65th Congress. H.R. REP. No. 61, 66th Cong., 1st Sess. (1919).

Congressional debate on the 1920 Act in this session of Congress, although extensive, provides little illumination on the surplus water clause.[52] Reference in the debates to the surplus water clause continued to be confined to hydroelectric power generation. *E.g.,* 58 CONG. REC. 2036 (1919) (remarks of Congressman Small re a moratorium on construction of power facilities by private parties at government dams; 59 CONG. REC. 1041 (1920) (remarks of Senator Nelson re charges for use of a dam). Since the surplus water clause in the final act is virtually identical to the language of earlier legislative proposals, the intended

[51] H.R. REP. No. 1147, 65th Cong., 3d Sess. (1919); 57 CONG. REC. 4630-35 (1919).

[52] The only significant amendment concerning surplus water was proposed by the Senate Commerce Committee, which recommended that the clause "from which flows surplus water not needed for Government purposes that may be disposed of under the provisions of this act" be deleted from the definition of "Government dam" in Section 3. The Senate agreed to the amendment without debate. 59 CONG. REC. 1105 (1920).

scope of the clause as reaching only hydroelectric power had been settled.

The usage of the term "surplus water" has been clear, without exception, from 1888 until 1973. The term was always used solely in the context of hydroelectric power generation in the early acts of Congress, in the bills leading to the 1920 act, and in the congressional debates. Never once was licensing of any other use of surplus water ever proposed. Certainly if Congress had intended the FPC to regulate consumptive uses, *i.e.,* irrigation, domestic, or fossil-fuel steam plants, words to that effect would appear in the early acts, proposed bills, and congressional debates, hearings, or reports. There are none. To conclude that Congress intended to regulate consumptive use of surplus water by steam plants amounts to unfounded speculation, and, in this case, judicial legislation.

B. Contrary to the court of appeals' assumption, the Federal Power Commission did not inherit the broad "spectrum" of responsibilities for water use planning that had been previously assigned to the Waterways Commission. Those responsibilities, in any event, did not include issuing licenses for water power, steam power, or any other water uses.

The court of appeals bolstered its holding on the surplus water clause by asserting that the Federal Power Commission was intended by Congress to assume the duties and authority of the Waterways Commission, which was abolished by Section 29 of the Federal Water Power Act. The court stated:

> "The Act of 1917 [an Act establishing the Waterways Commission] was explicitly repealed by the Act of 1920, and the newly created Federal Power Commission took over the planning and coordination responsibilities of the Waterways Com-

mission, which included consideraton of a spectrum of water uses not related to water power." (Footnotes omitted.) [53] App. 107.

The court of appeals, citing absolutely no authority for this proposition, used its assertion that Congress transferred to the FPC jurisdiction over "a spectrum of water uses" as a premise for the conclusion that:

> "[T]he 'surplus water' provision was intended to serve broader interests than the 'constructing, operating, and maintaining' clause, which was intended only to regulate nonfederal hydroelectric projects. It reflects an explicit concern with utilizing water resources to defray the cost of waterway improvements [54] as well as a concern with comprehensive water resource management. It empowers the FPC to license the use of either 'surplus water' or 'water power' from *any* Government dam, and thus is not limited to the mere leasing of excess Government water power." App. 109.

The legislative history of both acts contradicts the court of appeals assumption. The history shows (i) that the Waterways Commission's duties were restricted to conducting investigations and issuing reports; (ii) that the Commission lacked authority to issue licenses or permits for water power generation, much less steam power generation; and (iii) that the Waterways Commission's responsibilities were not

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[53] Contrary to the court's statement, the Federal Water Power Act did not repeal the 1917 Act, but only section 18 which created the Waterways Commission.

[54] (Our footnote.) As noted earlier, the Colorado River legislation earmarks the Secretary's receipts from disposition of water and power for special funds in the Colorado River Basin, not the national funds named in Section 17 of the Federal Power Act.

transferred to the Federal Power Commission. The history, chronologically, is as follows:

The Waterways Commission was established by Section 18 of the Rivers and Harbors Act of 1917, ch. 49, 40 Stat. 250. The Commission's scope over water matters was broad, but its duties were advisory, its functions being limited to coordinating efforts of government agencies, conducting investigations, and issuing reports and recommendations. Members were never appointed, so the Commission never functioned. The Commission's intended duties were as follows:

> "[T]o bring into coordination and cooperation the engineering, scientific, and constructive services, bureaus, boards, and commissions of the several governmental departments of the United States and commissions created by Congress that relate to study, development, or control of waterways and water resources and subjects related thereto, or to the development and regulation of interstate and foreign commerce, with a view to uniting such services in investigating, with respect to all watersheds in the United States, questions relating to the development, improvement, regulation, and control of navigation as a part of interstate and foreign commerce, including therein the related questions of irrigation, drainage, forestry, arid and swamp land reclamation, clarification of streams, regulation of flow, control of floods, utilization of water power, prevention of soil erosion and waste, storage, and conservation of water for agricultural, industrial, municipal, and domestic uses, cooperation of railways and waterways, and promotion of terminal and transfer facilities, to secure the necessary data, and to formulate and report to Congress, as early as practicable, a comprehensive plan or plans for the development of waterways and the water resources of the United States for the purposes of navigation and for every useful purpose,

> and recommendations for the modification or discontinuance of any project herein or heretofore adopted." 40 Stat. 250, 269.

Clearly, this act did not confer authority on the Waterways Commission to issue licenses or permits for water uses, and in particular for consumptive uses by steam plants. This statutory reading is confirmed by the views of members of Congress.

In discussing a proposed amendment by Mr. Humphreys to place the Waterways Commission in charge of the pending water power act, the following exchange in 1918 reveals the limited authority of the Waterways Commission:

> "MR. RAKER. The power given the commission in the river and harbor act relates soley to investigation and report, does it not?
>
> "Mr. HUMPHREYS. Yes.
>
> "MR. RAKER. While this bill [House substitute to S. 1419] authorizes the granting of permits and licenses.
>
> "Mr. HUMPHREYS. Yes." 56 CONG. REC. 9658 (1918).

This understanding of the Waterways Commission's authority was confirmed in further discussions in the House:

> "Mr. FERRIS. Does the gentleman contend that the Waterways Commission, created by the Newlands amendment, has any power to issue franchises for water power?
>
> "Mr. HUMPHREYS. Not a bit." *Id.* at 9661-62.

The amendment offered by Congressman Humphreys was then rejected.[55] *Id.* at 9663.

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[55] Mr. Humphreys tried again in 1919 to place the Waterways Commission in charge of the Federal Water Power Act. That effort failed. 58 CONG. REC. 2026-27 (1919).

In July, 1919, Congressman Anderson proposed an amendment to repeal the legislation authorizing appointment of the Waterways Commission. 58 CONG. REC. 2250 (1919). It read:

> "That section 18 of an act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, approved August 8, 1917, is hereby repealed." *Id.*

The debate on the House floor reveals that the Waterways Commission's authority was repealed, *inter alia,* because it was not a functioning agency, not, as the court of appeals assumed, to give the FPC jurisdiction over all areas of interest to the defunct Commission. *E.g.,* 58 CONG. REC. 2250-51 (1919). The repealing amendment was passed. *Id.* A second vote on the amendment was taken later on the same day, and again it was passed, without debate. *Id.* at 2262. The amendment was retained in identical form in Section 29 of the Federal Water Power Act as enacted.

The Senate, in 1920, aware that the House had voted to repeal the Waterways Commission, aware that the Commission's duties were primarily to investigate and report, and aware that the Commission was not functioning, discussed the possibility of transferring all of the Waterways Commission's powers to the Federal Power Commission. 59 CONG. REC. 1172-76 (1920). Senator Ashurst stated that he would "propose at the appropriate time an amendment" which would read:

> "And all authority and power conferred and duties imposed . . . upon the Federal water-power commission, which, in the discharge of the same, shall be subject to all the requirements of said section 18 governing the commission referred therein." *Id.* at 1173.

Senator Ashurst's proposal was never introduced as an amendment, and never discussed again.

As we have shown, the defunct Waterways Commission's duties were confined to making investigations and reports; it had no authority to license uses of water for hydroelectric generation, and certainly not for steam power generation. Furthermore, contrary to the court of appeals assumption, the repeal of the Waterways Commission was not intended to transfer all of that Commission's functions to the FPC. Indeed, the opposite is true.

Clearly, the court of appeals bridge, which it constructed to link the Waterways Commission's duties to the court's holding on surplus water, and to transport thereon a cargo of jurisdiction as a legacy from the expiring Commission to the new one, collapses under the weight of the legislative history.

CONCLUSION

We submit that:

1. It would be appropriate for this Court to reverse and vacate the judgment below as moot, without reaching the issue of interpretation of Section 4(e) of the Federal Power Act. There are two reasons for this:

A. Legislation subsequent to the Federal Water Power Act of 1920 superseded Section 4(e) of that act with respect to the consumptive use of water from government dams in the Colorado River Basin (if, indeed, Section 4(e) ever gave the Commission such jurisdiction), and vested all federal authority with respect to such consumptive use in the Secretary of the Interior, who has exercised it in executing comprehensive contracts for the storage and delivery of water for use in

the plants involved here which use water from government dams.

B. All of the complainants lack standing to litigate the issue of whether the Secretary or the Commission is empowered to control the consumptive use of water stored by government dams in the Colorado River Basin.

2. If, however, the Court decides to consider, on the merits, the conclusions reached by the court of appeals with respect to the interpretation of Section 4(e), it should affirm that portion of the opinion which holds that the Commission does not have jurisdiction to license steam-electric generating plants as "project works" in consequence of their use of the waters of navigable streams, but should reverse the holding that Section 4(e) authorizes the licensing of the use by steam plants of surplus water from government dams.

3. In any event, remand to the Commission, ordered by the court of appeals, is not warranted. All of the questions involved are questions of law for resolution by the Court.

Respectfully submitted,

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ATTACHMENT A

STATUTORY PROVISIONS

Federal Power Act

Section 4(e) of the Federal Power Act, 16 U.S.C. Section 797(e) provides:

"[Sec. 797] The Commission is authorized and empowered—

* * * * *

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the pur-

pose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further,* That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection."

Section 10(e) of the Federal Power Act, 16 U.S.C. Section 803(e), provides:

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of sections 792, 793, 795-818, and 820-823 of this title; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jursidiction of such lands

as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further,* That licenses for the development, transmission or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

Section 23(b) of the Federal Power Act, 16 U.S.C. Section 817, provides:

"It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior

to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part therof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws. June 10, 1920, c. 285, § 23, 41 Stat. 1075; Aug. 26, 1935, c. 687, Title II, § 210, 49 Stat. 846."

Boulder Canyon Project Act

Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d, provides in part:

"Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States

on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

Section 6 of the Boulder Canyon Project Act, 43 U.S.C. § 617e, provides:

> The dam and reservoir provided for by section 617 of this title shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 617d of this title relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.
>
> The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture

and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this subchapter or penalizing failure to comply with such regulations or with the provisions of this subchapter. He shall also conform with other provisions of the Federal Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this subchapter shall become effective as provided in section 617c of this title.

Section 8 of the Boulder Canyon Project Act, 43 U.S.C. Section 617g, provides:

(a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this subchapter to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact,

if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may have been negotiated and approved by said States and to which Congress shall have given its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided*, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 617d of this title prior to the date of such approval and consent by Congress.

Reclamation Project Act of 1939

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), provides:

"(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as

in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further,* That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."

Colorado River Storage Project Act

Section 4 and 14 of the Colorado River Storage Project Act, 43 U.S.C. §§ 620c, 620m, provide:

"Sec. 4. Except as otherwise provided in this Act, in constructing, operating, and maintaining the units of the Colorado River storage project and the participating projects listed in section 1 of this Act, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto): *Provided,* That (a) irrigation repayment contracts shall be entered into which, except as otherwise provided for the Paonia and Eden projects, provide for repayment of the obligation assumed thereunder with respect to any project contract unit over a period of not more than fifty years exclusive of any development period authorized by law; (b) prior to construction of irrigation distribution facilities, repayment contracts

shall be made with an 'organization' as defined in paragraph 2(g) of the Reclamation Project Act of 1939 (53 Stat. 1187) which has the capacity to levy assessments upon all taxable real property located within its boundaries to assist in making repayments, except where a substantial proportion of the lands to be served are owned by the United States; (c) contracts relating to municipal water supply may be made without regard to the limitations of the last sentence of section 9(c) of the Reclamation Project Act of 1939; and (d), as to Indian lands within, under or served by any participating project, payment of construction costs within the capability of the land to repay shall be subject to the Act of July 1, 1932 (47 Stat. 564): *Provided further,* That for a period of ten years from the date of enactment of this Act, no water from any participating project authorized by this Act shall be delivered to any water user for the production on newly irrigated lands of any basic agricultural commodity, as defined in the Agricultural Act of 1949, or any amendment thereof, if the total supply of such commodity for the marketing year in which the bulk of the crop would normally be marketed is in excess of the normal supply as defined in section 301(b) (10) of the Agricultural Adjustment Act of 1938, as amended, unless the Secretary of Agriculture calls for an increase in production of such commodity in the interest of national security. All units and participating projects shall be subject to the apportionments of the use of water between the Upper and Lower Basins of the Colorado River and among the States of the Upper Basin fixed in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, and to the terms of the treaty with the United Mexican States (Treaty Series 994).

* * * * *

"Sec. 14. In the operation and maintenance of all facilities, authorized by Federal law and under the jurisdiction and supervision of the Secretary of the Interior, in the basin of the Colorado River, the Secretary of the Interior is directed to comply with the applicable provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act, the Boulder Canyon Project Ad-

justment Act, and the Treaty with the United Mexican States, in the storage and release of water from reservoirs in the Colorado River Basin In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise."

Navajo-San Juan Chama Project Act

Sections 11(a), (b), 13(a), (b), 14 of the Navajo-San Juan Chama Project Act, 43 U.S.C. §§ 615ss(a), (b), 615uu (a), (b), 615vv provide:

Sec. 615ss(a), (b):

"(a) No person shall have or be entitled to have the use for any purpose, including uses under the Navajo Indian irrigation project and the San Juan-Chama project authorized by sections 615jj and 615pp of this title, of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries originating above Navajo Reservoir to the use of which the United States is entitled under these projects except under contract satisfactory to the Secretary and conforming to the provisions of sections 615ii-615yy of this title. Such contracts, which, in the case of water for Indian uses, shall be executed with the Navajo Tribe, shall make provision, in any year in which the Secretary anticipates a shortage, taking into account both prospective runoff originating above Navajo Reservoir and the available water in storage in Navajo Reservoir, for a sharing of the available water in the following manner: The prospective runoff shall be apportioned between the contractors diverting above and those diverting at or below Navajo Reservoir in the proportion that the total normal diversion requirement of each group bears to the total of all normal diversion requirements. In the case of contractors diverting above Navajo Reservoir, each such contract shall provide for a sharing of the runoff apportioned to said group in the same proportion as the normal diversion requirement under said contract

bears to the total normal diversion requirements of all such contracts that have been made hereunder: *Provided,* That for any year in which the foregoing sharing procedure either would apportion to any contractor diverting above Navajo Reservoir an amount in excess of the runoff anticipated to be physically available at the point of his diversion, or would result in no water being available to one or more such contractors, the runoff apportioned to said group shall be reapportioned, as near as may be, among the contractors diverting above Navajo Reservoir in the proportion that the normal diversion requirements of each bears to the total normal diversion requirements of the group. In the case of contractors diverting from or below Navajo Reservoir, each such contract shall provide for a sharing of the remaining runoff together with the available storage in the same proportion as then normal diversion requirement under said contract bears to the total normal diversion requirements under all such contracts that have been made hereunder.

"The Secretary shall not enter into contracts for a total amount of water beyond that which, in his judgment, in the event of shortage, will result in a reasonable amount being available for the diversion requirements for the Navajo Indian irrigation project and the initial stage of the San Juan-Chama project as specified in sections 615jj and 615pp of this title.

"No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections 615jj and 615pp of this title, shall be entered into for the delivery of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigations that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts: *Provided,* That nothing contained in the foregoing shall be construed to forbid the Secretary from entering into temporary water

supply contracts in the San Juan River Basin for any year in which he determines that water legally available for use in the upper basin of the Colorado River system would otherwise not be used there and is not needed to fulfill the obligations of the upper division States with respect to delivery of water at Lee Ferry.

"(b) If contracts are entered into for delivery from storage in Navajo Reservoir of water not covered by subsection (a) of this section, such contracts shall be subject to the same provision for sharing of available water supply in the event of shortage as in the case of contracts required to be made pursuant to subsection (a) of this section.

Sec. 615uu(a), (b):

"(a) The use of water, including that diverted from the Colorado River system to the Rio Grande Basin, through works constructed under authority of sections 615ii-615yy of this title, shall be subject to and controlled by the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act, and the Mexican Water Treaty (Treaty Series 994), and shall be included within and shall in no way increase the total quantity of water to the use of which the State of New Mexico is entitled and limited under said compacts, statutes, and treaty, and every contract entered into under sections 615ii-615yy of this title for the storage, use, and delivery of such water shall so recite.

"(b) All works constructed under authority of sections 615ii-615yy of this title, and all officers, employees, permittees, licensees, and contractees of the United States and of the State of New Mexico acting pursuant thereto and all users and appropriators of water of the Colorado River system diverted or delivered through the works constructed under authority of sections 615ii-615yy of this title and any enlargements or additions thereto shall observe and be subject to said compacts, statutes, and treaty, as hereinbefore provided, in the diversion, delivery, and use of water of the Colorado River system, and such condition and covenant shall attach as a matter of law whether or not set out or referred to in the instrument evidencing

such permit, license, or contract and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming and the users of water therein or thereunder by way of suit, defense or otherwise in any litigation respecting the waters of the Colorado River system.

Sec. 615vv:

"In the operation and maintenance of all facilities under the jurisdiction and supervision of the Secretary of the Interior authorized by sections 615ii-615yy of this title, the Secretary is directed to comply with the applicable provisions of the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act and the treaty with the United Mexican States in the storage and release of water from reservoirs in the Colorado River Basin. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise. Pub.L. 87-483, § 14, June 13, 1962, 76 Stat. 101."

Act of March 22, 1968, P.L. 90-272

Act of March 22, 1968, P.L. 90-272; 82 Stat. 52; U.S. Code Cong. & Admin. News at 63 (1968):

"NAVAJO RESERVOIR, NEW MEXICO—WATER DELIVERY CONTRACTS

"PUBLIC LAW 90-272; 82 STAT. 52

[S. J. Res. 123]

"Joint Resolution to approve long-term contracts for delivery of water from Navajo Reservoir in the State of New Mexico, and for other purposes.

"WHEREAS section 11(a) of the Act of June 13, 1962 (76 Stat. 96; Public Law 87-483), provides that: 'No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections

2 (Navajo Indian irrigation project) and 8 (San Juan-Chama project) of this Act, shall be entered into for the delivery of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigation that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin Compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts'; and

"WHEREAS the Secretary has made such determination in conection with the following contracts transmitted to Congress by letter dated November 21, 1967:

	Water diversion (acre-feet)	Estimated water depletion (acre-feet)	Proposed uses
"Public Service Company of New Mexico	20,200	16,200	Thermal-electric generation.
"Southern Union Gas Company	50	50	Pump cooling
Utah Construction and Mining Company	44,000	35,300	Thermal-electric generation.
	64,250	51,550	

"Now, therefore, be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:*

"Such contracts are hereby approved by the Congress. The Secretary may enter into amendments thereto which would in his judgment be in the interest of water conservation, but the total water depletion shall not exceed the estimates set forth in this joint resolution.

"Approved March 22, 1968."

Colorado River Basin Project Act

Sections 301(b), (c), and 303(a), (b), (c), (d) of the Colorado River Basin Project Act, 43 U.S.C. §§ 1521(b), (c), 1523(a), (b), (c), (d):

Sec. 1521(b), (c):

"(b) Article II(B) (3) of the decree of the Supreme Court of the United States in Arizona against California (376 U.S. 340) shall be so administered that in any year in which, as determined by the Secretary, there is insufficient main stream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada, diversions from the main stream for the Central Arizona Project shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of California served under existing contracts with the United States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of this subsection. This subsection shall not affect the relative priorities, among themselves, of water users in Arizona, Nevada, and California which are senior to diversions for the Central Arizona Project, or amend any provisions of said decree.

"(c) The limitation stated in subsection (b) of this section shall not apply so long as the Secretary shall determine and proclaim that means are available and in operation which augment the water supply of the Colorado River system in such quantity as to make sufficient mainstream water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada.

* * * * *

Sec. 1523(a), (b), (c), (d):

"(a) The Secretary is authorized and directed to continue to a conclusion appropriate engineering and economic studies and to recommend the most feasible plan for the construction and operation of hydroelectric generating and transmission facilities, the purchase of electrical energy, the purchase of entitlement to electrical plant capacity, or any combination thereof, including participation, operation, or construction by non-Federal entities, for the purpose of supplying the power requirements of the Central Arizona Project and augmenting the Lower Colorado River Basin Development Fund: *Provided*, That nothing in this section or in this Act contained shall be construed to authorize the study or construction of any dams on the main stream of the Colorado River between Hoover Dam and Glen Canyon Dam.

"(b) If included as a part of the recommended plan, the Secretary may enter into agreements with non-Federal interests proposing to construct thermal generating powerplants whereby the United States shall acquire the right to such portions of their capacity, including delivery of power and energy over appurtenant transmission facilities to mutually agreed upon delivery points, as he determines is required in connection with the operation of the Central Arizona Project. When not required for the Central Arizona Project, the power and energy acquired by such agreements may be disposed of intermittently by the Secretary for other purposes at such prices as he may determine, including its marketing in conjunction with the sale of power and energy from Federal powerplants in the Colorado River system so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates. The agreements shall provide, among other things, that—

"(1) the United States shall pay not more than that portion of the total construction cost, exclusive of interest during construction, of the powerplants, and of any switchyards and transmission facilities serving the United States, as is represented by the ratios of the respective capacities to be provided for the United States therein to the total capacities of such facilities.

The Secretary shall make the Federal portion of such costs available to the non-Federal interests during the construction period, including the period of preparation of designs and specifications, in such installments as will facilitate a timely construction schedule, but no funds other than for preconstruction activities shall be made available by the Secretary until he determines that adequate contractual arrangements have been entered into between all the affected parties covering land, water, fuel supplies, power (its availability and use), rights-of-way, transmission facilities and all other necessary matters for the thermal generating powerplants;

"(2) annual operation and maintenance costs shall be apportioned between the United States and the non-Federal interests on an equitable basis taking into account the ratios determined in accordance with the foregoing clause (1): *Provided, however,* That the United States shall share on the foregoing basis in the depreciation component of such costs only to the extent of provision for depreciation on replacements financed by the non-Federal interests;

"(3) the United States shall be given appropriate credit for any interests in Federal lands administered by the Department of the Interior that are made available for the powerplants and appurtenances;

"(4) costs to be borne by the United States under clauses (1) and (2) shall not include (a) interest and interest during construction, (b) financing charges, (c) franchise fees, and (d) such other costs as shall be specified in the agreement.

"(c) No later than one year from September 30, 1968, the Secretary shall submit his recommended plan to the Congress. Except as authorized by subsection (b) of this section, such plan shall not become effective until approved by the Congress.

"(d) If any thermal generating plant referred to in subsection (b) of this section is located in Arizona, and if it is served by water diverted from the drainage area of the Colorado River system above Lee Ferry, other provisions of existing law to the contrary notwithstanding, such consumptive use of water shall be a part of the fifty thousand acre-feet per annum ap-

portioned to the State of Arizona by article III (a) of the Upper Colorado River Basin Compact (63 Stat. 31)."

Colorado River Compact

(H. Doc. 717, 80th Cong., pp. A19, A21)

"ARTICLE III

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

* * * * *

"(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

"(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

"ARTICLE VIII

"Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

"All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

Upper Colorado River Basin Compact

(H. Doc. 717, 80th Cong., p. A169)

"ARTICLE III

"(a) Subject to the provisions and limitations contained in the Colorado River Compact and in this Compact, there is hereby apportioned from the Upper Colorado River System in perpetuity to the States of Arizona, Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use of water as follows:

"(1) To the State of Arizona the consumptive use of 50,000 acre-feet of water per annum.

"(2) To the States of Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use per annum of the quantities resulting from the application of the following percentages to the total quantity of consumptive use per annum apportioned in perpetuity to and available for use each year by Upper Basin [*sic*] under the Colorado River Compact and remaining after the deduction of the use, not to exceed 50,000 acre-feet per annum, made in the State of Arizona.

State of Colorado ..... 51.75 percent,
State of New Mexico .... 11.25 percent,
State of Utah ..... 23.00 percent,
State of Wyoming ..... 14.00 percent."

SUPREME COURT, U.S.

SUPPLEMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1380

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Petitioners*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

No. 73-1667

FEDERAL POWER COMMISSION, *Petitioner*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

Supplement to Brief Filed by Arizona Public Service Co. et al.

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ITEM 1

LEGISLATIVE HISTORY OF THE SURPLUS WATER CLAUSE OF SECTION 4(e) OF THE FEDERAL POWER ACT, 16 U.S.C. § 797(e)

Prepared by Counsel for Arizona Public Service Co., et al.*

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* Mr. Ely wishes to acknowledge the contribution made to this study by his associates, Frederick H. Ritts, Robert F. Pietrowski, and members of his staff, Messrs. Robert E. Bartkus, Michael L. Michael, Lawrence E. Strickling, and Keith M. Werhan.

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I. 1888-1914

The history of the "surplus water" clause encompasses many more years than just the history of the Federal Water Power Act. Before passage of the comprehensive water power act in 1920, Congress enacted legislation, on a project-to-project basis, granting the Secretary of War authority to lease surplus water at federal dams. The earliest act where surplus water was leased was in an appropriation bill for rivers and harbors passed in 1888. Act of Aug. 11, 1888, ch. 860, 25 Stat. 400. (Perhaps the earliest mention of "surplus water" is in a deed of property on the Fox River in Wisconsin to the United States by the Green Bay and Mississippi Canal Co. between 1870 and 1872. The deed is cited but not quoted in *Kaukauna Water Power Co.* v. *The Green Bay & Mississippi Canal Co.*, 142 U.S. 254, 259 (1891).) The following provision was made concerning the Muskingum River in Ohio:

> "[T]he Secretary of War is hereby authorized and empowered to grant leases or licenses for the use of the water powers on the Muskingum River at such rate and on such conditions and for such periods of time as may seem to him just, equitable, and expedient: *Provided,* That the leases or licenses shall be limited to the use of the surplus water not required for navigation." Act of Aug. 11, 1888, ch. 860, 25 Stat. 400, 417.

Two years later, a similar provision was passed concerning the Green and Barren Rivers in Kentucky:

> "The Secretary of War is hereby authorized and empowered to grant leases or licenses for the use of the water powers on the Green and Barren Rivers at such a rate and on such conditions and for such periods of time as may seem to him just,

> equitable, and expedient; said leases not to exceed the period of twenty years: *Provided,* That the leases or licenses shall be limited to the use of the surplus water not required for navigation." Act of Sept. 19, 1890, ch. 907, 26 Stat. 426, 447.

Although not limited by the language of the statutes, the only leases made were for water power developed at the dam site. In 1911 the War Department reported it was leasing water power at seven dams on the Muskingum River, two dams on the Barren River and one dam on the Green River. 47 CONG. REC. 4008 (1911). Furthermore, the charges were based on the amount of horsepower developed at the dam. *Id.*

The phrase "not required for navigation" in reference to surplus water indicates that the water of a river could be divided into two portions—one, the amount needed to insure unimpeded navigation and two, the remainder, which would be called "surplus water."

A 1902 act authorizes leases of surplus water in the Cumberland River in Tennessee, but expressly limits them to the water power created by Lock and Dam Numbered One:

> "And the Secretary of War is hereby authorized, in his discretion, to grant leases or licenses to the highest responsible bidder for the use of the water power created by said dam . . . *Provided,* that any lease or license so granted shall be limited to the use of the surplus water not required for navigation . . . ." Act of June 13, 1902, ch. 1079, 32 Stat. 331, 358, *as amended* Act of June 28, 1902, ch. 1299, 32 Stat. 408, 409.

These three acts all involve the leasing or licensing of surplus water at a federal navigation dam after the

dam has been constructed. A second type of government dam is one constructed by a private party who, in consideration for deeding the dam and locks to the government, receives a lease of the water power. This distinction is emphasized by Senator Burton in 1913:

> "They [water power acts] are of three classes. The first class comprises dams constructed by acts of Congress where surplus water, not needed for navigation, has been leased for water-power purposes . . . . There is a second class in which it has been provided that where dams, or dams and locks, are to be constructed in the future by the Government, the water power created incidentally thereto shall be leased under the direction of the Secretary of War . . . . A third class comprises acts of Congress granting permission to lessees to construct dams in navigable streams subject to various conditions." 49 CONG. REC. 2601-03 (1913).

The Act of April 26, 1904, ch. 1605, 33 Stat. 309, granted permission to the city of Chattanooga, Tennessee, to construct a lock and dam across the Tennessee River, which would then be deeded to the United States.

Section 4 contained the following provision:

> "That in consideration of the construction of said lock and dam, free of cost to the United States . . . the United States hereby grants to the municipality, corporation, company, or persons constructing said lock and dam under the provisions of this Act such rights as it possesses to use the water power produced by said dam, and to convert the same into electric power or otherwise utilize it for a period of ninety-nine years . . . ." *Id.*

Nowhere in this act or in two similar acts passed the following year, Act of February 9, 1905, ch. 566, 33

Stat. 712, and Act of Mar. 3, 1905, ch. 1482, 33 Stat. 1117, 1132, is "surplus water" or the leasing of "surplus water" ever mentioned.

Four statutes enacted by Congress in 1906 and 1907 do contain the term "surplus water." However, the term is not used in the leasing clause, that is, there is no lease of the surplus water itself, as there was in the earlier bills. Instead the term is used to indicate the restrictions placed on the use of water by a privately built dam and power station.

The Act of March 6, 1906, ch. 517, 34 Stat. 52, authorizing the construction of dams in the Tennessee River at Muscle Shoals, Alabama, contained the following restriction:

> "*And provided further,* That said dam or dams and works shall be limited only to the use of the surplus water of the river, not required for the navigation of the Muscle Shoals Canal or the Tennessee River . . . ." *Id.*

An identical provision was included in the authorization of the North Mississippi Traction Co. to erect a dam across the Bear River in Mississippi:

> "*And provided further,* That said dam or dams and works shall be limited only to the use of the surplus water of the river, not required for the navigation of Bear River . . . ." Act of April 23, 1906, ch. 1660, 34 Stat. 130,

in the dam authorization act for the Coosa River at Lock Two, Alabama:

> "*And provided further,* That said dam or dams and works shall be limited only to the use of the surplus water of the river, not required for the navigation of the Coosa River . . . ." Act of May 9, 1906, ch. 2438, 34 Stat. 183, 184,

and in the Act of March 4, 1907, ch. 2912, 34 Stat. 1288 concerning the river at Lock Twelve:

> "*Provided further,* That said dam and appurtenant works shall be limited to the use of the surplus water only of the river not required for the navigation of the Coosa River . . . ." *Id.*

The addition of the words "of the river" does not change the meaning of the term "surplus water." The House Report on the Coosa River, Lock Twelve bill states:

> "The bill grants to the company the right to the use of the surplus water for power purposes . . . ." H.R. REP. No. 7648, 59th Cong., 2d Sess. 1 (1907). See S. REP. No. 6948, 59th Cong., 2d Sess. 1 (1907).

This is essentially the same usage of the term as was made in the early bills. Surplus water still applies only to water power developments and then only in reference to developments at the dam site. The major difference between these four acts and the three early bills is that in the latter statutes, the dams and locks had already been constructed. Surplus water, if measured at the dam site, was a readily identifiable quantity because the amount of water necessary to operate the locks was known. However, in these later situations, the federal government only reserved the right to later build a lock at the dam. The government needed to insure that there would be water available in the future for the navigation locks and therefore restricted the dam builder to the use of the surplus water for his water power generation. This clause reserved the government's right to a share of the water in the future for navigation purposes and prevented the builder from making too large an investment in his power station by basing it on utilizing the entire flow of the stream.

A 1906 bill created a commission which was to report to the Secretary of War:

> ". . . concerning the use of surplus water which shall not be needed for the purposes of navigation flowing over the dams now under construction by the United States in the Mississippi River between the cities of Saint Paul and Minneapolis, Minnesota." Act of June 25, 1906, ch. 3530, 34 Stat. 456.

The language of this bill lends further support to the definition of surplus water as being that quantity of water over and above the requirements for navigation at the site of the dam. Furthermore, although the title of the first section of the bill does not limit the scope of the inquiry, Section 2 states that the commission is to report only on the following use of surplus water:

> "Whether there will be any surplus water flowing over said dams not needed for the purposes of navigation which might be available for mechanical or commercial power." *Id.* at 457.

The committee report makes it clear that the water will be used only in a water power project:

> "This commission is directed to make a thorough investigation of the possibilities of making use of this water power for the benefit of the Government." H. R. REP. No. 4914, 59th Cong., 1st Sess. 3 (1906).

The term "surplus water" next appeared in an appropriation act for rivers and harbors in 1909. The usage was similar to that in the first three bills:

> "And the Secretary of War is hereby authorized and empowered to grant leases or licenses for the

> *use of the water power created by the government dam* on the Wabash River at Mount Carmel, Illinois, at such a rate, and on such conditions, and for such periods of time, as may seem to him just, equitable, and expedient, *the said leases or licenses to be limited to the use of the surplus water* not required for navigation, and to a period not exceeding twenty years . . . ." Act of March 3, 1909, ch. 264, 35 Stat. 815, 819 (emphasis added).

Thus, for over twenty years, the meaning of the term had remained virtually unchanged.

The 62d Congress in 1911 considered a bill, S. 943, which originally was to authorize the Secretary of War to enter into a contract with the Birmingham Water, Light and Power Co. for the improvement of navigation and development of water power on the Black Warrior River in Alabama. The bill as passed omitted all the provisions relating to water power and was essentially a bill for the improvement of navigation. Act of August 22, 1911, ch. 41, 37 Stat. 32. The omitted Section 5 provided that the company:

> ". . . shall have the right to construct, maintain, own, and operate . . . electrical power stations and other structures for the development of water power for industrial and other purposes, and for converting to its own use, benefit, and profit *the power created with the surplus* water not needed for lockage, including the right to sell, lease, or otherwise dispose of said power. . . ." 47 CONG. REC. 3771 (1911) (emphasis added).

The Acting Chief of Engineers, Edward Burr, described this section of the bill as containing:

> ". . . the exclusive grant to the company of the right to use and dispose of the surplus power,

> not required for the purposes of navigation, which may be created or developed by said works." H.R. REP. No. 133, 62d Cong., 1st Sess. 3 (1911).

He equates surplus water with surplus power, and navigation with lockage. Thus, the amount of water required for navigation is the same as the quantity of water required for locks. Surplus water is determined by the measurement of water needs at the dam itself.

Senator Johnston of Alabama introduced a bill in the 2d Session of the 62d Congress entitled: "A Bill [t]o authorize the Secretary of War to lease the surplus water created by any improvement on navigable streams, and for other purposes." S. 7223, 62d Cong., 2d Sess. (1912).

The title of the bill does not restrict the scope of the bill to any particular uses of surplus water nor does it indicate any limits on the definition of "surplus water." Therefore, it might be assumed that the bill deals with "surplus water" as commonly defined and its normal uses. The language of the bill clearly indicates, first, that surplus water is to be leased for water power, and second, that the surplus water is to be utilized at the dam site:

> "[T]he Secretary of War [is] authorized in his discretion, to issue permits in the following cases:
>
> "First. When any corporation or person, being authorized by the State, desires to erect power stations upon any navigable river within the United States and connect the same with any Government dam, now or hereafter built, or under the course of construction, in aid of navigation, the Secretary of War may grant such permission, and such corporation or person . . . may generate and use the power therefrom." *Id.*

The corporation or person would have to pay a charge to the government:

> ". . . which must be governed by the amount of horsepower that can be developed and marketed at the particular dam or dams . . . ." *Id.*

The bill was referred to committee and no floor action was ever taken on it. But it is useful in indicating that the common historical usage of the term "surplus water" was only in relation to water power and only in reference to power developed at the dam site.

II. 1914-1915 (63d Congress)

In 1914 Congress for the first time considered legislation with the purpose of regulating water power development in a general fashion. In the Sixty-third Congress, Second Session, Congressman Adamson introduced H.R. 16053 and Congressman Ferris introduced H.R. 16673. The Adamson bill provided for the control of water power on navigable streams and the Ferris bill pertained to water power development on public lands. See 51 CONG. REC. 12676 (1914) (remarks of Congressman Kelly). See also *id.* at 11403, wherein Congressman Underwood remarked: "[The Adamson] bill is limited in its terms to the navigable waters of the United States, and does not affect . . . the public lands . . . .The boundary of this bill, to begin with and to end with, is the navigable streams of the United States." The general purpose of the Ferris bill, H.R. 16673, was "to reserve in perpetuity to the people of the United States in fee in all public lands available for hydroelectric purposes and to provide a practical system for leasing such lands . . . ." H.R. REP. No. 842, 63d Cong., 2d Sess. 1 (1914). The leasing authority in the Ferris bill was granted to the Secretary of the In-

terior in Section 1 and included "constructing, maintaining, and operating dams, water conduits, reservoirs, power houses, transmission lines, and other works necessary or convenient to the development, generation, transmission, and utilization of hydroelectric power. . . ." *Id.* at 2. The bill, however, as was typical of public lands legislation, did not include "surplus water" language and is not helpful in analyzing the clause in Section 4(e) of the Federal Water Power Act of 1920.

Whether the primary purpose of the Adamson bill, H.R. 16053, was to promote navigation or the development of water power upon navigable waters was a matter of some controversy. The Committee Report on H.R. 16053 stated, "we conceive the prime consideration of the Government to be the promotion of navigation. . . ." H.R. REP. No. 592, 63d Cong., 2d Sess.; 51 CONG. REC. 11068, 11069 (1914). Congressman Adamson insisted during the debate that:

> " . . . this bill is a navigation bill. A great many people talk about it as a water-power bill, and the most that is said about it treats it as a water-power bill.
>
> "This bill is limited strictly to the navigable streams of the United States, and its paramount purpose is to develop and maintain navigation in those navigable streams." *Id.* at 11417.

See also *id.* at 11429, wherein Congressman Adamson further stressed that "this is a navigation bill and not a water-power bill." Despite Mr. Adamson's insistence, many congressmen remained unconvinced and viewed navigation as the jurisdictional peg upon which Congress was to assert control over water power development. Thus, Congressman Lenroot declared that H.R. 16053 "both in its present form and with the amendments proposed, is a water-power bill in fact, although

navigation is the basis of our jurisdiction." *Id.* at 12328. He further stated that:

> "... while it is clear that the paramount purpose of the bill before us is to aid water-power companies and not navigation, I would not condemn it for that reason. On the contrary, the development of water powers upon many of our streams is far more important than the development of navigation; and while our jurisdiction rests upon the right to control navigation, sometimes navigation itself should be considered as a minor and incidental matter as compared with the great public benefit flowing from the proper development of our water powers.
>
> "So, . . . this bill ought to be discussed as a water-power bill, for that is what it is, and I propose to discuss it as such." *Id.* at 12329.

Congressman Lieb sided with Mr. Lenroot, declaring:

> "I do not believe that this bill will 'first and primarily, promote navigation.' I am firmly convinced that that very desirable result will be subordinated, and that the first and primary effort will be to promote water power for private gain." *Id.* at 13030.

House consideration of the bill supported the Lenroot view, for debate centered on water power development. This controversy supports the notion that the Sixty-third Congress was concerned only with regulating one aspect of power development—water power.

Section 14 of the Adamson bill contained a provision dealing with surplus water, which, as introduced and reported to the House floor read:

> "That the Secretary of War, upon the advice and with the approval of the Chief of Engineers,

may lease to any applicant having complied with the laws of the State in which the dam is constructed or to be constructed by the United States, *the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant,* and owned by the United States, and on such terms as may be deemed by the Secretary of War, and Chief of Engineers for the best interests of the United States, and in awarding such lease preference shall be given to the applicant whose plans are deemed by any action of Congress or by the Secretary of War and Chief of Engineers to be best adapted to conserve and utilize in the public interest the navigation and water power resources of the region, and all such leases and parties thereto and the terms and conditions thereof shall be reported annually to Congress." *Id.* at 11415 (emphasis added).

The report of the House Committee on Interstate and Foreign Commerce stated that:

"Section 14 is a new section authorizing the Secretary of War, with the approval of the Chief of Engineers, to lease to any applicant who has complied with the laws of the State in which the dam may be located any surplus power developed by a dam that is constructed or owned by the United States for the purposes of navigation. In making these leases preference shall be given to the applicant whose plan is approved by any act of Congress or by the Secretary of War and Chief of Engineers as best adapted to the interest of navigation or to conserve the water-power resources of the region. All such leases and the parties thereto and the terms and conditions thereof shall be reported annually to Congress." *Id.* at 11070.

Further, the report stated:

> "Yielding to the pressure from many directions we have included in the present bill authority for the Secretary of War to accommodate communities and derive some revenue for the Government from projects constructed wholly at the expense of the Government by leasing on satisfactory terms, with proper safeguards, the surplus water not needed for navigation at such projects. For the same reason we have also included a provision permitting the use of public lands for dam projects on terms to be prescribed by the Secretary of War where the structure proposed is to be in a navigable stream, for be it remembered that this bill deals only with portions of streams which are only theoretically navigable, but which could be made navigable, as we believe, under the operation of the legislation proposed." *Id.* at 11069.

Remarks made by congressmen during the general House debate on H.R. 16053 pertaining to Section 14 in general, and the surplus water clause in particular, support the view that only plants which used surplus water to produce water power were reached. Congressman Mann states that Section 14 "provides for leasing surplus water power owned by the United States." *Id.* at 11402. Mr. Mann further elaborates:

> "Section 14 provides that the Secretary of War shall lease to any applicant the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed.
>
> "We have many navigation dams in the United States. At many of them there is surplus water which may be used for the development of water power, and we authorize the Secretary of War to lease that surplus water power and to make charges for it." *Id.* at 11403.

Finally, Congressman Mann interprets the section as conveying "by lease the use of surplus water power at dams which we have on navigable streams. That is the purpose of it." *Id.* at 11404. In decrying what he perceived to be defects in the Adamson bill, Congressman Lenroot stated:

> "Section 14 of the bill permits the Secretary of War to lease the surplus water power created by any Government dam. No restrictions are placed upon the Secretary; the lease may be for 99 years or 999 years; and not only that, but when Government dams are being constructed the Secretary of War, without consulting Congress, may take in as a partner with the United States in the undertaking a water-power company, and agree with it as to what its share of the partnership contribution shall be. He is required to report to Congress his action after he has acted, but not before." *Id.* at 12330.

Opposition by conservationists in the House brought about a remodeling of H.R. 16053, which was presented to the House on July 20, 1914. *Id.* at 12406-07. Section 14 was changed so as to remedy the defect pointed to by Congressman Lenroot above. The surplus water clause, however, remained unchanged. The revised Section 14 read as follows:

> "That the Secretary of War, upon the advice and with the approval of the Chief of Engineers, may lease to any applicant having complied with the laws of the State in which the dam is constructed or to be constructed by the United States, *the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant,* and owned by the United States, and on such terms as may be deemed by the Secretary of War and Chief

> of Engineers for the best interests of the United States, and in awarding such lease preference shall be given to the applicant whose plans are deemed by any action of Congress or by the Secretary of War and Chief of Engineers to be best adapted to conserve and utilize in the public interest the navigation and water-power resources of the region: [*Provided,* That no lease shall be made to any private corporation or applicant operating for private profit for a longer term than 50 years, and that the provisions of this act, so far as applicable, shall be made a part of the terms and conditions of any such lease], and all such leases and the parties thereof and the terms and conditions thereof shall be reported annually to Congress." *Id.* at 12407 (emphasis added).

General debate on the revised H.R. 16053 indicates that Section 14 and the surplus water clause were viewed by congressmen as reaching no further than water power plants. Prior to offering his own bill, H.R. 17854, as a substitute to the Adamson bill, Congressman Smith discussed what he perceived as the defects of H.R. 16053. Relevant to Section 14, Mr. Smith states:

> "A flat 50-year grant, at least—it may work out much longer—is given to every grantee of Federal water power, with no option of the Government to modify the term; while in many of our States, as well as other progressive countries, where hydro-electric development is most successful, the grant runs for periods of 20 to 40 years and present acts give the Government a leeway of option under the phrase: 'No longer than 50 years.'
>
> * * * * *
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> "As stated by the authors and sponsors of the bill, it has one prime purpose and that is to attract and interest private capital. It places commer-

> cial use and purpose first and foremost. It is true that in section 14, which pertains to leases of dams built by the Government, preference is given to the lessee who is able to conserve navigation and the water-power development. But, of course, that goes without saying, because the source of all Federal control flows out of the constitutional authority of Congress over navigation." *Id.* at 12577-79.

See also Mr. Smith's reference to the applicability of H.R. 16053 to "surplus water power," *id.* at 12578.

The substitute to H.R. 16053 proposed by Mr. Smith left unchanged the concept that surplus water was water used for hydro-power generation by incorporating the same surplus water clause contained in Section 14 of the Adamson bill. Thus, Section 18 stated:

> "That the commission may lease to any applicant embraced in section 2 hereof, who has complied with the laws of the State in which the dam is constructed or to be constructed by the United States, *the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant,* and owned by the United States, and on such terms as may be deemed by the commission for the best interests of the United States, and in awarding such lease preference shall be given to the applicant whose plans are deemed by the commission best adapted to conserve the public interest as provided in section 3 hereof, and all such leases and the parties thereto and the terms and conditions thereof shall be subject to the control and regulations of the commission under the general provisions of this act." *Id.* at 12586 (emphasis added).

In comparing his bill to H.R. 16053, Congressman Smith remarked, "Section 18 governs the lease of dams built by the Government, according to the provisions of the original [Section 14 of H.R. 16053], except that in cases of contesting applications for the lease . . . navigation, public use, and industrial use take precedence over power for commercial sale." *Id.* at 12588. See also *id.* at 12584, wherein Congressman Smith stated that H.R. 16053 granted the Secretary of War power to "regulate hydroelectric projects."

Further evidence of the intended scope of the surplus water clause in Section 14 of the Adamson bill is found in the Extension of Remarks by Congressman Brown submitted on July 20, 1914, the day the "new" Adamson bill was presented to the House floor. *Id.* at 767-68 (Appendix). Congressman Brown stated that the effort behind the bill "obviously is to induce capital to build dams across navigable streams in aid of navigation for the sake of the profit to be earned in selling light and power generated from the surplus waters of the streams." *Id.* at 767. Addressing himself more specifically to Section 14, he remarked:

> "Section 14 is entirely in keeping with the rest of the bill. It permits the Secretary of War and the Chief of Engineers to lease the right to develop power from the surplus water flowing over any dam, present or future, for any length of time, with or without consideration." *Id.* at 768.

Other references made during debate regarding Section 14 indicate that it was intended merely to reach water power facilities. While considering a proposed amendment by Congressman Lindbergh to Section 6 which would bring within that section "lessees under section 14 of this act," *id.* at 13031, it was noted that Section

14 "is a provision for the leasing of the power from the reservoirs. . . ." *Id.* at 13032 (remarks of Congressman Lindbergh). In the *Christian Science Monitor* of May 6, 1914, included in the *Record* by Congressman Stevens of New Hampshire, *id.* at 13249-51, an article appeared which analyzed and compared the various "conservation legislation pending before the second session of the Sixty-third Congress." In listing the basic provisions of the Adamson bill, the *Monitor* stated that the bill provides that "[s]urplus power developed by [a] Government plant may be leased." *Id.* at 13250.

The debate surrounding the Sherley amendment to Section 2 is particularly helpful in ascertaining the intended scope of the surplus water clause in Section 14. As revised and presented to the House, Section 2 read:

> "That as a part of such approval such conditions and stipulations may be imposed as the Secretary of War and the Chief of Engineers may deem necessary to protect the present and future interests of the United States, which may include the condition that the persons constructing or maintaining such dam shall construct, maintain, and operate in connection therewith, without expense to the United States, a lock or locks, booms, sluices, or any other structure or structures which the Secretary of War and the Chief of Engineers or Congress then may deem necessary in the interests of navigation, in accordance with plans made a part of such approval; and also that in case such facilities of navigation shall not be made a part of such original approval and construction, whenever Congress shall deem such facilities necessary, the persons owning such dam shall convey to the United States, free of cost title to such land as may be required for such constructions and approaches, and shall grant to the United States free water

> power or power generated from water power for building and operating such constructions, and in such original approval, at the discretion of the Secretary of War and Chief of Engineers, may be required to maintain and operate such lock without expense to the United States [: *Provided,* That whenever Congress has heretofore provided, either directly or indirectly, through any official or department of the United States Goverment, for the construction, maintenance, and operation of a lock, free of cost to the United States, as may be deemed necessary for navigation by the Secretary of War and Chief of Engineers in any dam in navigable waters authorized by law at the date of passage of this act, in all such cases such obligation shall continue to be of full force and effect]." *Id.* at 12406.

Congressman Sherley proposed to add to the end of the section the following:

> "The Secretary of War may provide as a condition of such approval for the payment to the United States of reasonable annual charges for the benefits that accrue to the grantee by the authority given under this act, and at the end of 20 years, and every 10 years thereafter, the Secretary of War may readjust the annual charges as may then be just and reasonable." *Id.* at 12759.

This amendment spurred vigorous debate and provided a vehicle for much discussion of the nature of both the surplus water clause in Section 14 and the Supreme Court decision in *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. 53 (1913).

House consideration of the Sherley amendment to Section 2 of the Adamson bill demonstrates that use of the *Chandler-Dunbar* decision to support a reading of

the surplus water clause to reach non-water power uses is unjustified. Congressman Stevens of Minnesota stated:

> "All it [the *Chandler-Dunbar* decision] says is this, that the excess power not needed for navigation from a future dam constructed for navigation under authority of Congress, owned by the Government, may be sold; and that is exactly what we have been contending for." 51 CONG. REC. 12775 (1914).

Congressman Adamson made an ambiguous reference to the scope of the Section 14 leasing power stating that "we have provided in Section 14 of the bill, in strict accordance with the *Chandler-Dunbar* case, that the Secretary of War may lease any water at any Government construction not needed for navigation." *Id.* at 12893. Later in this speech, however, Mr. Adamson made it clear he was referring to "the use of the surplus water for hydroelectric purposes." *Id.* It is clear that Congressman Adamson viewed Section 14 as providing for federal government leases of water power. *Id.* at 12894. Finally, Congressman Kent stated that "[t]he *Chandler-Dunbar* decision only clinches what has long been held—that the Federal Government can go onto the rivers, put in dams, and do whatever it chooses to do with the resultant power." *Id.* at 12905.

Comments by congressmen during the general debate on the Adamson bill support the view that the bill, in its entirety, was intended to reach no further than hydro-power developments. Congressman Smith of New Hampshire pointed out at four points in one speech before the House that "the prime object of [the Adamson] bill is to enlist private capital in hydroelectric development." *Id.* at 12576. Congressman

Kelly asserted that H.R. 16053 provided "for control of water power on navigable streams. . . ." *Id.* at 12676. Mr. Kelly later attacked the bill for being contrary to "sound water-power policy" in that it was "apparently founded on the principle of encouraging private enterprises to develop water power and for the sake of that development to sacrifice the public interest." *Id.* Congressman Lenroot opposed the Adamson bill on the ground that it contained too many concessions to "water-power companies," see *id.* at 12330. Congressman Lonergan supported H.R. 16053 asserting:

> "This water-power controversy has been one of long standing. The real purpose of the present bill and the real solution of the problem is to serve the public interest; to safeguard the people against any overcharge for power; to prevent illegal combinations in restraint of trade and at the same time to permit and encourage the investment of capital in the development of water-power projects in order that the vast amount of hydroelectric power now being wasted in this country can be immediately utilized.
>
> * * * * *
>
> "It is now time to pass constructive legislation which will enable the development of these water powers on terms fair to the public and to private capital." *Id.* at 12668-69.

In addition to general remarks pertaining to the nature of the Adamson bill, several congressmen explicitly distinguish between steam power and water power when addressing themselves to the intended scope of the bill. Congressman Underwood, during general House debate on H.R. 16053, discussed the production of coke in by-product coke ovens, in which the waste gases produce steam power at approximately one-half

the cost of hydroelectric power. *Id.* at 12336. Mr. Underwood then stated, "Thus we find a competition between cheaper steam power produced by waste gases from by product coke ovens and hydroelectric power, which competition exists as an economic fact and can not be regulated by law." *Id.* This competition could be regulated, of course, if the bill pending before Congress sought to regulate steam power plants as well as water power plants. Congressman Bryan brings the distinction between steam power and water power into a sharper focus in the context of his discussion of the rate regulation provision in H.R. 16053:

> "The rate must be uniform for electric energy in a given locality, however produced. The people own a power that can produce energy, say, at $1 per unit, whatever unit you may use. The cheapest competitor to *this power* is steam, which costs, say, $3 per unit. This great difference in costs makes the water power very valuable to the public." *Id.* at 12593 (emphasis added).

Congressman Stevens of Minnesota dealt with what he perceived to be the factors affecting the price of power at some length, maintaining that the price of "this power" was determined by "the competition with others in that same region." *Id.* at 12695. The "other" type of power referred to was steam power. *Id.* Similarly, it was argued by Congressman Rainey that the charges imposed upon the water-power companies would:

> ". . . not have any effect on the consumer of electrical power. It will not increase the cost to him, because the cost of electrical power will be controlled by the cost of steam power, and because the cost of producing steam power is always higher." *Id.* at 12777.

Finally, the following statement by Congressman Lenroot demonstrates that the Congress is concerned with regulating hydro-power development, and concerned with peculiar problems of power:

> "Regulation of water power . . . is not possible to the same extent or in the same way that regulation of *other public utilities* is, because every other public utility, a street railway or an electric-light company, furnishing their power by steam, is unlimited in capacity to furnish power. They can be compelled by State or sovereign authority to furnish such utilities and such service as the market demands. That is not true with reference to a water-power company.
>
> * * * * *
>
> "The usual standard of a fair rate is a reasonable return on the value of the property after paying operating expenses; but will that apply in the case of the water-power company? No; not necessarily, because there is another element there to be considered, and that is where you have . . . 50,000-horsepower users and the water-power companies can only furnish 10,000 horsepower, then the question comes, Will it not be a discrimination that we give four-fifths of the users—or allow one-fifth of the users to get their power at one-half the price that the four-fifths pay? And that must be taken into consideration.
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> * * * * *
>
> ". . . any public-utility commission or the Secretary of War, if he has jurisdiction, will take into consideration that other element, and the result would be, in every case where there is not water power sufficient to furnish the entire market, that the cost of the water power will be determined by the cost of the steam power. . . ." *Id.* at 12769 (emphasis added).

It is clear from the above language that Congress was concerned with a measure which dealt only with the development of water power. Steam power was a known entity, but was viewed by the legislators as a factor to consider in devising a comprehensive plan for water power regulations not as a suitable subject for regulation under the Adamson bill.

It is against this background that Congressman Stevens of New Hampshire offered an amendment to H.R. 16053 which would strike out Section 14 and insert the following:

> "That the Secretary of War be, and he is hereby, authorized to enter into leases *for the use of surplus water and water power generated at dams and works constructed wholly or in part by the United States in the interest of navigation,* at such rates or such terms and conditions and for such periods of time, not to exceed 50 years, and with such provision for the periodical readjustment of rentals as may seem to him just, equitable, and expedient, subject, however, to the provisions of this act governing the authorization, maintenance, and operation of power plants, and to all regulations governing the use and disposition of the power, so far as the same may be applicable. And all such leases, the parties thereto and the terms and conditions thereof, shall be reported annually to Congress: *Provided,* That said Secretary of War in making such leases shall give preference to any municipal corporation or other public corporation not operated for private profit." *Id.* at 13256 (emphasis added).

Although the Stevens amendment changed the surplus water clause to language which closely resembled that adopted in the Federal Water Power Act of 1920, it was not intended to affect the scope of the surplus

water clause. The purpose of the amendment was to give an express preference to municipalities over private corporations in the procurement of leases and to make a strict provision for a license term of fifty years. See generally *id.* at 13256-60. The debate surrounding the Stevens amendment shows that the House did not propose to reach non-hydro-power uses with the "use of surplus water" language. Congressman Stevens of New Hampshire explained his proposed amendment thus:

> "[T]he only substantial change made in section 14 by the amendment which I have offered is that no *lease of water-power rights* to anyone shall be for a longer period than 50 years.
>
> ". . . no *lease of water-power* rights which belong to the Government should be given in perpetuity to any corporation, private or public." 51 CONG. REC. at 13257 (emphasis supplied).

Congressman Adamson, the sponsor of H.R. 16053, reacted thus to the Stevens amendment:

> "[I]f the committee [referring to the House] thinks that it is more likely to serve the purpose intended, it is all right with me. I can not see any difference." *Id.* at 13256.

Congressman Falconer, in speaking to the Stevens amendment, concerned himself with "hydroelectric matters" and "hydroelectric power." *Id.* at 13258. Finally, Congressmen Stevens of Minnesota, who claimed responsibility for the original Section 14, opposed the proposed amendment. Congressman Stevens (Minn.) did not mention an expanded surplus water clause to cover non-hydro-power uses, but rather sought

"the best use of *this incidental power. . . .*" *Id.* at 13256 (emphasis added). Congressman Stevens (Minn.) further stated:

> "Now, the result would be that if the [Stevens] amendment . . . were adopted the municipalities situated upon navigable rivers would want to do two things: they would want to have the plans of the dams changed so that navigation would no longer be the primary consideration but that *water power would be the main consideration;* and, secondly, these municipalities would endeavor to have dams constructed not so much for navigation, or ostensibly for navigation, but *in reality for water power.*
>
> "The result would be that there would be an increasing demand for these improvements, which would cost the Treasury of the United States enormous sums of money . . . for the sake of helping favored municipalities get a *chance to buy water power from water power dams* cheaper than could be secured in any other way. . . ." *Id.* (emphasis added).

The above debate demonstrates that the House, in "the first of the bills leading to the enactment of the Federal Water Power Act," App. 106, n. 165, intended the phrase "use of surplus water" to cover only hydropower uses.

The Stevens substitute to Section 14 was agreed to by the House on August 4, 1914, 51 CONG. REC. 13260 (1914), the date the Adamson bill was approved. *Id.* at 13276. The bill was sent to the Senate, whereupon it was referred to the Committee on Commerce on August 5, 1914. *Id.* at 13296. The Senate Commerce Committee reported a substitute bill, S. 6413, with a recom-

mendation to strike out all after the enacting clause of H.R. 16053 and to insert the substitute bill. S. REP. No. 846, 63d Cong., 3d Sess. 1 (1914). Section 10 of the substituted bill reported by Senator Shields contained a surplus water clause:

> "The Secretary of War may lease to any applicant having the capacity of grantee as herein defined, whom has acquired and owns the right to use the water for power and other purposes under the laws of the State in which a dam is constructed by the United States, *the right to utilize the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant, and owned by the United States,* and on such terms as may be deemed by the Secretary of War for the best interests of the United States, and reasonable and fair to both parties, and in awarding such lease preference shall be given to the applicant whose plans are deemed by the Secretary of War to be the best adapted to conserve and utilize in the public interest the navigation and water resources of the region, and all such leases and the parties thereto and the terms and conditions thereof shall be reported annually to Congress. The charges and rents arising from such lease or leases are hereby reserved and appropriated as a special fund in the Treasury to be expended for the maintenance of said dam and the further improvement of the waterway in which the same may be situated under the direction of the Secretary of War." (Emphasis added.)

Although the phrase "utilize the surplus water" may be interpreted broadly to include non-hydro-power uses, Senator Shields' report indicates clearly that the bill is intended to deal with "[t]he question of water power development by the construction of dams across

navigable streams and the improvement of navigation in connection with water-power development. . . ." S. REP. No. 846, *supra,* at 1. The report further states:

> "The committee has endeavored to carefully safeguard the interests of the public by vesting the right of absolute control and regulation of water-power development on navigable streams and its sale and distribution into the hands of proper public authority. . . . It is believed the bill is fair and just between the public and water-power development, and adequately protects the interests of the Government; that it properly conserves an exceedingly valuable asset that should be utilized; and at the same time offers sufficient inducement for it fullest development through private interests, municipal and public-utility corporations." *Id.* at 1-2.

Thus, the Commerce Committee proposed substitute to H.R. 16053 is another example of a broadly worded surplus water clause interpreted by its drafters to include merely the use of surplus water for water power purposes. With the exception of one day's debate, 52 CONG. REC. 4955 (1915), no further action was taken on H.R. 16053 in the Sixty-third Congress.

III. 1916 (64th Congress)

The concern of the 64th Congress with comprehensive water power legislation principally took the form of two bills, S. 3331, regulating the construction of dams across navigable waters, and H. R. 408, dealing with water power development on public lands. The House bill, also referred to as the Ferris bill, did not contain any provision concerning "surplus water" or "surplus water power." The Senate bill concerning

navigable waters, known as the Shields bill (*note:* S. 1419, 65th Congress, is also called the Shields bill), contained the following section as reported from committee:

> "Sec. 10. The Secretary of War may lease to any applicant having the capacity of grantee as herein defined, and having complied with the laws of the State in which a dam is constructed or to be constructed by the United States, *the right to utilize the surplus water power over and above that required for navigation at any navigation dam now or hereafter constructed,* either with or without contribution by the applicant, and owned by the United States . . . ." 53 CONG. REC. 2198 (1916) (emphasis added).

The term "surplus water" is not expressly included in S. 1419 but it is apparent from the debates that Section 10 was intended to incorporate surplus water. Senator Shields explained the provision in the following manner:

> "Under Section 10 . . . provision is made for payment of the excess of water arising from dams built solely by the Government . . . ." (*Note:* as well as from certain other dams) *id.* at 3064.

The Senate committee report contains the following summary of Section 10:

> "The bill also provides for the lease of water power in excess of that needed for operation and navigation facilities, incidentally produced by dams heretofore or which may be hereafter constructed by the United States in the improvement of navigable rivers . . . ." S. REP. No. 89, 64th Cong., 1st Sess. 4 (1916).

The report makes it apparent that Section 10 of the bill is limited to taking advantage of water power at government dams and does not extend to any other use of federal projects.

The Senate debates also contain an amendment by Senator Husting to Section 10 which would insert the following language pertaining to surplus water:

> "Sec. 10. That the said Secretaries be, and are hereby, authorized to enter into leases for the use of surplus water and water power generated at dams constructed wholly or in part by the United States in the interests of navigation . . . ." 53 CONG. REC. 3295 (1916).

This proposed section is identical to Section 14 of H.R. 16053 as passed by the House of the previous Congress except for the clause giving preference to municipal corporations.

Senator Husting, in explaining his amendment, indicates that the split of the term "surplus water power" into "surplus water and water power" is not intended to expand the licensing authority of the Secretary of War:

> "I think that by the adoption of this amendment leases for the use of surplus waters and water power generated at Government dams will be so regulated that the people will get such benefit as they are entitled to have from the sale of *power.*" *Id.* at 3296 (1916) (emphasis added).

He clearly refers to the leasing of surplus water as a sale of power generated at a federal dam. The quotation is ambiguous in that Senator Husting is not specific as to what kind of power can be sold. He does not expressly rule out the use of water for steam power

generation. But the fact that his amendment was identical to Section 14 of H. R. 16053, which was clearly limited to water power development would indicate that the context of his amendment was the same. There is no indication anywhere in the debates that the amendment was intended to extend beyond water power projects. If his intent was to expand the jurisdiction of the "surplus water power" clause beyond a water power project located at a federal dam, he does not indicate it. The thrust of his amendment was to provide for periodical readjustment of rentals and a limitation to 50 years on the length of a lease. It was rejected by the Senate.

Later in the Senate debates, Senator Husting offered an entire bill as a substitute to the Shields bill, which was also rejected. Section 27, which replaces the "surplus water power" section of S. 3331, further indicates that "surplus water" refers only to water power developments located at a federal dam:

> "Sec. 27. That the commission is hereby authorized in its discretion, to lease, for the *development of hydraulic and hydroelectric power,* any lands of the United States at the sites of dams and works constructed wholly or in part by the United States in the interests of navigation, together with the right to use surplus water disposable by the United States and not deemed by the commission from time to time necessary for navigation." *Id.* at 3668 (emphasis added).

S. 3331 passed the Senate with Section 10 virtually unchanged. However, the House Committee on Interstate and Foreign Commerce struck out the entire bill and substituted a new bill similar to the Adamson bill

of the 63d Congress. Section 19, relating to the use of government dams, reads in part as follows:

> "Sec. 19. That the Secretary of War be, and he is hereby, authorized to enter into leases for the use of surplus water and water power generated at dams and works constructed wholly or in part by the United States in the interests of navigation . . . ." H. R. REP. No. 404, 64th Cong., 1st Sess. 6 (1916).

The section is identical to Section 14 of H.R. 16053 as passed by the House in 1914. The House report explains that Section 19 is limited to the leasing of power created at federal dams:

> "Section 19 regulates the method to be pursued by the War Department in *leasing the power* at dams erected in whole or in part by the Government itself. It contains substantially the same provisions passed by the House two years ago and continues the method existing as to Government dams for many years, under which the War Department has satisfactorily regulated and leased surplus water at a number of such structures." *Id.* at 11 (emphasis added).

The language indicates that the purpose of the "surplus water" clause is to systematize a procedure which had been carried on in a piecemeal manner for many years. It does not indicate that the procedure is to be changed in regard to what may be licensed. It appears that the House intended the clause only to apply to such uses of surplus water as had been licensed in the past, *i.e.*, water power projects at federal dams.

Committee Chairman Adamson, in introducing the substitute bill on the floor, stated that Section 19 only applied to leases of power:

> "Secretary of War may lease out power for not to exceed 50 years on such terms as may seem to

> him best, but preference must be given, other things being equal, to bid solely for municipal use by municipal corporations." 53 CONG. REC. 10448 (1916).

House debate on Section 19 occurred on July 11, 1916. *Id.* at 10838-39. It was limited to discussion over the clause giving preference to municipal corporations. There was no indication that the section was intended to cover any use of surplus water other than for water power. Mr. Smith of Minnesota, who offered the amendment to the preference clause, stated the following in regard to the purpose of Section 19:

> "The section under consideration authorizes the Secretary of War to enter into leases for the use of power generated at dams constructed wholly or in part by the United States . . . ." *Id.* at 10838.

He sees no significance in the splitting of the term "surplus water power" into "surplus water and water power." To him, and apparently to the rest of Congress, they mean the same thing. Congressman Kent of California submitted to the Congressional Record a comparative analysis of the Shields bill (S. 3331) and the House substitute. He interpreted Section 10 of S. 3331 which uses the express language "surplus water power" but not "surplus water" in the following manner:

> "The Secretary of War may lease, on such terms as he may provide, the right to develop power from surplus water at dams owned by the United States and where the cost of construction is borne by the United States or jointly with lessee." *Id.* at 1559 (Appendix) (1916).

In discussing the House substitute, Mr. Kent stated the appropriate section:

> "Provides that Secretary of War is authorized to lease surplus water and water power generated at Government dams for not to exceed 50 years upon terms provided by the Secretary with periodical readjustment of rentals." *Id.*

Mr Kent makes no comment in his comparative analysis that the two sections are not intended to apply to the same activity—the utilization of government dams for water power. Furthermore, his use of the term "surplus water" in describing a clause that did not expressly use that term is further support for the argument that "surplus water" and "surplus water power" are essentially one and the same.

While Congress in 1916 directed its attention to comprehensive water power legislation, the surplus water clause appeared in a bill involving only the use of government dams. The bill, S. 3703 and H.R. 7560, was entitled:

> "A Bill [a]uthorizing the Secretary of War to grant permission for utilization of water power at locks and dams constructed by the Government on navigable rivers of the United States."

The use of the dam was expressly limited to water power:

> ". . . That the Secretary of War . . . may lease to any applicant . . . the right to develop power from the surplus water over and above that required for navigation at any navigable [*sic*] dam now or hereafter constructed . . . ."

These bills emphasize the fact that Congress considered the utilization of government dams for water power as

a separate problem from private water power development. But they also indicate that Congress was only interested in taking advantage of the water power at these dams and not of other uses. See H.R. 7997, 65th Cong., 2d Sess., a similar bill which indicates that this interpretation was valid at least through 1918.

IV. 1918 (65th Congress)

In 1918, the Senate passed S. 1419, also known as the Shields bill, regulating the construction of dams across navigable waters. The Senate Committtee report accompanying the bill makes it clear that the purposes of the bill relate only to navigation and water power:

> "The bill provides primarily for the improvement of navigation in rivers under the jurisdiction of Congress with private capital, as distinguished from appropriations by Congress for that purpose and, secondarily, for the development and utilization of the water power of those rivers resulting from such improvement, as well as that created by dams constructed and to be constructed under the authority of Congress." S. REP. No. 179, 65th Cong., 2d Sess. 1 (1917).

Section 10 of S. 1419 concerns the use of federal dams:

> "Sec. 10. The Secretary of War may lease to any applicant having the capacity of grantee as herein defined, and having complied with the laws of the State in which a dam is constructed or to be constructed by the United States, the right to utilize the surplus water power over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant, and owned by the United States . . . ." 55 CONG. REC. 227 (1917).

The wording of the section is identical to the wording of Section 10 of S. 3331 of the 64th Congress, indicating the Senate's intent concerning the use of federal dams had not changed.

The Senate report contains the following summary of Section 10:

> "The bill also provides for the lease of water power in excess of that needed for operation and navigation facilities, incidentally produced by dams heretofore or which may be hereafter constructed by the United States in the improvement of navigable rivers . . . ." S. REP. No. 179 at 4.

This summary is identical to a summary contained in S. REP. No. 89, 64th Cong., 1st Sess. 4 (1916), concerning Section 10 of S. 3331. This adds further support to the statement that the position of the Senate concerning comprehensive water power development had not changed substantially in almost two years.

The bill was sent to the House and referred to the Committee on Water Power. The committee had been created by the House on January 11, 1918, pursuant to H.R. RES. 220, 56 CONG. REC. 844 (1918). The creation of such a committee was in response to a Wilson administration proposed substitute bill, authored primarily by O. C. Merrill, a Department of Agriculture engineer. The bill contained several major changes from previous attempts at legislation. As amended by the 65th and 66th Congresses, it became the Federal Water Power Act of 1920. The House substitute marked the first time that a comprehensive water power bill was extended to cover both navigable waters and public lands. The administration bill as proposed could not have been referred to any single House committee. *Id.* at 850. The new committee was formed to consider the

administration bill. It was composed of the six ranking members from the House Committee on Interstate and Foreign Commerce, Committee on Public Lands, and Committee on Agriculture. *Id.* at 903. Congressman Thetus Sims of Tennessee was named chairman. The other members were: Anderson, Candler (Miss.), Doremus, Esch, Ferris, Hamilton (Mich.), Haugen, Hayden, LaFollette, Lee (Ga.), Lenroot, Lever, McLaughlin (Mich.), Parker (N.J.), Raker, Stephens (Nebr.) and Taylor (Colo.). *Id.* Later, Congressman Sinnott was named to replace Mr. Lenroot when he resigned to take a Senate seat. *Id.* at 5704.

This bill called for the creation of a commission composed of the Secretaries of War, Interior, and Agriculture. In Section 4(d) of the original House substitute, the Commission was authorized and empowered:

> "To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation, State or municipality, for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, or in any of the navigable waters of the United States or upon any part of the public lands and reservations of the United States (including the Territories), *or for the purpose of utilizing the surplus water or water power over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant, and owned by the United States,* which licenses shall be irrevocable, except as herein provided. . . ." H.R. Rep. No.

715, 65th Cong., 2d Sess. 23 (1918) (emphasis added).

This was the language of the bill as it was introduced in the committee deliberations. There are three features worth noting. First, the authority to lease surplus water had previously always been the subject of a separate section. In this bill, it is combined with the authority to license project works in Section 4(d). (*Note:* In the present law, Section 4(d) is renumbered as Section 4(e).)

Second, the conjunction "or" is used between the terms "surplus water" and "water power" instead of "and" as in previous bills. It is not clear why this change was made but there is no historical authority for concluding that the alteration of language indicates the intent of Congress to expand its authority over uses of "surplus water."

Third, the language of the "surplus water" clause indicates that the definition had not been changed since the early bills. Surplus water is still computed by deducting that amount of water needed for navigation from the total quantity of water. The construction of the clause "over and above that required for navigation at any navigation dam" may imply that the measurement is to be made at the dam site. At the very least, it indicates that the water power project is to be located at the dam site.

The bill as reported by the Committee on Water Power to the House floor contained three amendments relating to the "surplus water" clause. First, the clause itself, Section 4(d) was amended to read:

> ". . . or for the purpose of utilizing the surplus water or water power from any navigation dam . . . ." *Id.* at 3.

The word "at" was changed to "from" and the phrases "over and above that required for navigation" and "now or hereafter constructed either with or without contribution by the applicant, and owned by the United States" were struck from the clause. However, this deletion does not indicate that the definition of surplus water had been changed. The second amendment involving "surplus water" was the addition of the definition of "navigation dam."

> " 'Navigation dam' means a dam or other work, constructed or owned by the United States for the improvement of navigation, with or without contribution from others, *from which flows surplus water not needed for navigation that may be disposed of under the provisions of this Act.*" *Id.* at 2 (emphasis added).

The Committee simply shifted the language to a different section of the bill.

The third amendment was the addition of language in Section 10(e) concerning charges for the use of navigation dams:

> "(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission. When licenses are issued that contemplate the use of navigation dams or other structures owned by the United States, in the discretion of the commission the charges to be paid by the licensee may be readjusted at periods of not less than ten years, in a manner to be described in each license: Provided, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is used by such State or municipality for State or municipal purposes; and that licenses for the development, transmission, or distribution

of power for domestic, mining, or irrigation use in projects of not more than fifty horsepower capacity, may be issued without charge; *but in no case shall a license be issued free of charge for the development and utilization of power created by any navigation dam and that the amount charged therefor in any license shall be as nearly as possible that ascertained by the commission to be the value of such power.*" *Id.* at 7 (emphasis added).

Section 10(e) contains the criteria for all charges made by the Commission, whether under the "project works" clause or the "surplus water" clause. It states that charges for the use of navigation dams are to be based on the value of power created. The implication is that the "surplus water" clause involves only the licensing of a different type of water power project than the "project works" clause, but it is still limited to water power. (*Note*: See debates on charges implying that they should be the same for both clauses on pp. 48-49.)

The Committee on Water Power held extensive hearings on the substitute bill in 1918 and the almost 900 pages of testimony help to explain these amendments as well as adding further support for the argument that the Federal Water Power Act was limited to water power.

Perhaps the strongest support comes from O.C. Merrill, the principal draftsman of the FWPA. In response to questioning by Congressman Raker concerning non-power uses of water, Mr. Merrill stated:

> "Mr. MERRILL . . . . This bill is concerned only, in such instances, in the development of power. When that is done the licensee may make any other use that is available.

"Mr. RAKER. But the bill simply gives him a license for power purposes?
"Mr. MERRILL. Yes."
Hearings on S. 1419 Before the House Committee on Water Power, 65th Cong., 2d Sess. 89 (1918).

Congressman Raker, from the State of California, was concerned about the fact that the bill lacks any provision for the development of irrigation:

"Mr. RAKER. Are you so sure that there ought not to be a provision in here so that arrangements could be made to handle that?
"Mr. MERRILL. I do not think it is necessary at all. I do not see how there can be any question about it whatever. *The only thing this bill is doing is to grant a license for that particular power development occupying the public lands.* There is no assumption of any control whatever over any other uses the licensee may make of that water outside of that development.
"Mr. LAFOLLETTE. Have we any jurisdiction over that water?
"Mr. MERRILL. I do not think so."
Id. at 89-90 (emphasis added).

In the same discussion, Congressman Taylor gave his view of the scope of the act:

"This is a power bill and grants rights for power. Now if a party appropiates water under the State law, or if one of those companies makes an appropriation of water by a reservoir or otherwise for irrigation, under the State law they will have that additional property right in addition to the power privilege granted here; but this bill is for the purpose, as I understand it, of giving authority to create power and utilize water for power purposes." *Id.* at 92.

A later exchange between Rep. Taylor of Colorado (a member of the Water Power Committee, later chair-

man of the Appropriations Committee) and Calvert Townley, assistant to the president of the Westinghouse Electric and Manufacturing Co., clearly indicates that the steam plants were to be excluded from the bill:

> "Mr. TAYLOR. You have spoken about the handicaps that are against water power development as compared with steam. The steam plants are not subjected—or will not be subjected, generally speaking—to the governmental regulations that this bill provides for will they?
>
> "Mr. TOWNLEY, No, sir.
>
> "Mr. TAYLOR. And they will not be subjected either to the payment of Federal royalties?
>
> "Mr. TOWNLEY. No, sir." *Id.* at 179.

The testimony of F. C. Stevens of the Itasca Paper Company indicates that the substitution of "from" for "at" was not intended to expand the definition of surplus water, but instead related to setting a fee for the use of surplus water. Up to this point, it has been argued that the definition of surplus water was that quantity of water not required for navigation measured at the dam site. This definition made sense as long as the leases for surplus water were restricted to those situations where there was the possibility of navigation at the dam site. This had been the situation in all previous leases for surplus water. They had generally been made for those dams previously constructed by the government at which locks were in operation. Mr. Stevens testified that if a government dam were built at the headwaters of a stream where navigation was impossible, all the water passing over the dam would be considered surplus water because none

of it was required for navigation. This fact had ramifications to the setting of a charge:

> "[I]f the bill be construed as providing as the measure of compensation the surplus water or water power above that required for navigation *at the dam*, you realize it might be construed as requiring a payment for all of the water flowing over the dam, because none of it is required for local navigation." *Id.* at 395.

Mr. Stevens said that the situation could be clarified by changing the word "at" to "from" or "generated from" or "created from." Such a change would indicate that:

> "The measure of compensation shall not be for surplus water for navigation at the dam, but the surplus water that is not needed for navigation elsewhere . . . ." *Id.* at 395.

In the context of the hearings, the amendment was not intended to expand the definition of "surplus water" to include downstream uses of water but instead to allow the amount of water needed for downstream navigation to be taken into account in determining what quantity of water at the dam would be surplus. The clause still only applies to water power projects located at the federal dam.

The House debates serve to highlight the concerns behind the movement for comprehensive water power legislation. Surrounding the debates was a strong feeling that the nation's potential water powers were going to waste. For the eight years following the 1910 amendment of the General Dam Act of June 21, 1906, all water power projects had to individually be approved by Congress, and even then the permits were revocable at will. Congressman Snell gave the follow-

ing statement on the state of the development of water power in 1918:

> "Instead of 'An act to regulate power development', [the 1910 act] should have been called 'An act to prohibit power development.' As proof of this statement I have only to call your attention to the fact that with but two small exceptions no power developments and river improvements have been made by private capital upon navigable streams since 1912. . . ." 56 CONG. REC. 9118 (1918).

This sense of wasting a resource by not using it was heightened by the fact that huge quantities of coal and oil were being consumed that would otherwise have been conserved if water power was more widely developed. Congressman La Follette emphasized this point:

> "We are burning up millions of tons of coal and other millions of gallons of oil for fuel and power purposes that could have in a large part been conserved had we only made use of the millions of horsepower energy that could have been developed from our waterfalls and rapids, which once developed are there practically in perpetuity, and thus made our coal and oil supply last many decades longer for purposes not suitable for handling by hydroelectric energy." *Id.* at 9112.

In line with this emphasis on conservation the House realized that many water power sites would not be available for private development because federal navigation projects were already located or were to be located at such locations. Use of those dams for water power development faced the same pitfalls as private dams, as Congress had to grant authority to the Secretary of War to lease the surplus water for each individual project. Thus there was a large quantity of

potential water power that was currently unavailable for development. Congressman Sims summarized the situation as follows:

> "It takes time, and it takes a long time, to build a tremendous dam. A water-power dam in some places, on some watercourses, is estimated to cost as high as $25,000,000. But there are a number of Government dams, navigation dams, dams that have been built on navigable rivers for the purpose of improving navigation, that are now unavailable simply because there is no law that permits their utilization. *Those dams, or the water power produced by Government navigation dams,* can be made available immediately. . . . " *Id.* at 8929 (emphasis added).

Another factor adding to the feeling of urgency in the House was the influence of World War I and the realization that the country's power needs had expanded enormously.

These were the main concerns behind water power legislation in 1918. In light of these considerations, it is apparent that the primary purpose of the "surplus water" clause was to maximize the amount of water power that would be available to the country. In order to have a comprehensive bill, some provision had to be made for using the power incidentally created by the federal government in the course of improving navigation. Interest in irrigation and other uses of the water were secondary after the major concerns of navigation and water power. In deciding whether to grant a license for a water power project, the FPC, by Section 10(a), was to make sure the project took into consideration these secondary uses. But these considerations arose only in the context of deciding between two applications for a private project or deciding whether to

license at all. Before allowing a stream to be dammed, the FPC wanted to make sure that the project would be the best one for that particular location in terms of navigation, water power, irrigation, flood control, and other concerns. But in the situation where the dam had already been built or was to be built by the government, the considerations of Section 10(a) would not be applicable. The size and location of the project would already be determined. The lessee of the use of the dam would have no opportunity to alter the existing project so as to increase the water available for a secondary use such as irrigation. The House debates further indicate the secondary role of Section 10(a). Congressman Mondell, expressing his concern that FPC would construe the bill as granting jurisdiction over the question of the diversion of water for irrigation, reminded his colleagues that "[t]his is a power bill." *Id.* at 9114-15. Mr. Mondell further remarked that the bill as originally drawn was "confined to the use of water for purposes of power." *Id.* at 9115. The House demonstrated this narrow view of FPC authority by accepting Congressman Taylor's amendment to Section 10 (a) which deleted the word "irrigation." *Id.* at 9901-03. Speaking in support of his proposed amendment, Mr. Taylor stated:

> "This is a water-power bill. The purpose of this legislation is to regulate the water power of the entire United States, both upon the navigable and nonnavigable streams. It is purely a water-power measure and we have no right in this bill to include and interfere with other subjects that are not necessarily involved in water-power control." *Id.* at 9901.

Congressman Little, noting that licenses for the use of navigation dams were subject to readjustment every 10

years (*Note:* This provision was changed in the conference report to an initial 20-year term and then readjustment every 10 years. 57 CONG. REC. 4632 (1916).), offered an amendment, extending this provision to cover all licenses:

> "This provision they have in the bill is so just and wise that it occurred to me that it ought to be extended to cover everything in contemplation in the bill. If it is good for navigation dams, it is good for all other licensees. If it is necessary for the navigation licensees, it must be necessary for others . . . . I do not think it would be fair, because the licensee of a navigation dam might be called on after the first 10 years to raise and raise his payments, and there might possibly be a rivalry between them, and therefore the other licenses ought to be adjusted every 10 years. . . . It will put all the licenses upon the same basis as this navigation-dam license that the bill provides for. It will put all of the licensees on an equality. If you do not insert this amendment one man, 50 years from now, may be rolling in millions while another fellow in the same business a few miles away may be making only a reasonable amount of money." 56 CONG. REC. 9912 (1918).

Mr. Little indicates that licenses for the use of government dams will be for the same business as licenses under the "project works" clause—water power development.

The implication is that the "surplus water" clause, while obviously licensing a different dam (public v. private) than under the "project works" clause, is still limited to licensing for the development of water power.

The amendment was rejected, but not because the House disagreed with his equating of the licensing of

private projects and projects at government dams. The amendment was rejected because of the creation of uncertainty as to the amount of the charges thus tending to discourage investment in private projects. Congressman Small explained the problem as follows:

> "The difference between navigation dams and a private dam is this: A navigation dam has already been constructed by the United States, so that the licensee of a Government dam is not subjected to the large expense involved in the construction of a private dam. The dam is intended primarily for navigation purposes and incidentally for water power. The gentleman will understand that one of the difficulties in the development of water power by the issuing of licenses for the construction of private dams lies in the difficulty of inducing capital to make investment in these water-power plants. If the price to be paid is to be adjusted every 10 years, would the gentleman invest his money, stock, or bonds in a water power plant? . . . The present law, which was reported by the Committee on Rivers and Harbors, requires that all Government dams which in this bill are called navigation dams shall be constructed with sloughs and all the other particular appliances of a dam useful for water power, so that when the licensee takes possession of it he has a complete dam fitted for navigation, and also fitted to be immediately *applied to the development of water power.* That great expense has been borne already." *Id.* at 9913 (emphasis added).

Mr. Small does not take issue with Mr. Little's view that the private water power developer and the licensee of a government dam are in the same business and may be in direct competition. In fact, he tends to ratify that view by referring to the navigation dam as being outfitted for water power development.

The substitute bill was passed by the House and referred to a conference committee. The conference report proposed no changes from the House substitute in the wording of Section 4(d) except for the substitution of the word "Government" for "navigation." This substitution was made throughout the bill. The committee explained the change as follows:

> "It is thought that 'Government dam' is a more comprehensive and clearer expression of what is intended than the expression 'navigation dam.' In the definition of the term 'Government dam' the words 'the improvement of navigation' are stricken out and the words 'Government purposes' are inserted. In the opinion of the conference committee this is a proper change, as it is thought to be more comprehensive." 57 CONG. REC. 4635 (1919).

The definition of "Government dam" in Section 3 then read as follows:

> "'Government dam' means a dam or other work constructed or owned by the United States for Government purposes, with or without contribution from others, from which flows surplus water not needed for Government purposes that may be disposed of under the provisions of this act." *Id.* at 4630.

The change was a reasonable one. Until 1918, bills containing the "surplus water" clause had all been limited to the construction of dams across navigable rivers. The only federal dams affected by that legislation would have been dams built for the improvement of navigation. But by combining the navigable waters bills and the public lands bill in the House substitute, the "surplus water" clause could then extend to federal dams built on public lands across non-navigable

streams for purposes such as irrigation or flood control. The switch in language was simply a recognition of this fact.

V. 1919-20 (66th Congress)

A bill which substantially corresponded to the House substitute bill considered in the previous session, as amended in conference (H.R. 3184), was introduced in the House of Representatives. No hearings were held on H.R. 3184, since Congress merely continued the unfinished business of the Sixty-fifth Congress. See H.R. REP. No. 61, 66th Cong., 1st Sess. (1919). The only significant amendment concerning surplus water was proposed by the Senate Commerce Committee, which recommended that the clause "from which flows surplus water not needed for Government purposes that may be disposed of under the provisions of this act" be deleted from the definition of "Government dam" in Section 3. The Senate agreed to the amendment without debate. 59 CONG. REC. 1105 (1920). The Conference Committee endorsed the amendment, since it "strikes out certain words not necessary to the definition of 'Government dam'." Statement of House Conferees accompanying Conference Report on H. R. 3184, *id.* at 6383. It is clear the deletion does not imply any change in the definition of surplus water.

Congressional debate on the 1920 Act, although quite extensive, provides no clear evidence on the scope of the surplus water clause, *per se*. This is not surprising if it is remembered that the Act was the culmination of many years effort on the part of Congress. The significant provisions of the bill were generally well-known and understood by the legislators. Debate centered on

the numerous points of contention between the conservationists on the one hand, and the representatives of the water-power interests on the other. It is submitted that the intended scope of the surplus water clause as reaching only hydro-power uses was not questioned by the legislators and therefore was not the subject of debate. Had any congressman viewed the clause as embracing the licensing of steam plants, it is inconceivable that the clause would have encountered no resistance by the power interests, or would not have been applauded by the conservationists.

An amendment proposed by Senator Wadsworth to Section 4(e) may, however, be relevant in determining the intent of Congress in changing the word "at" to "from," causing the surplus water clause to read: "[F]or the purpose of utilizing the surplus water or water power *from* any Government dam. . . ." 16 U.S.C. § 797(e) (1970) (emphasis added). The Wadsworth amendment provided that the word "from" be inserted following the word "along" in Section 4(e), so as to read: "To issue licenses . . . for the purpose of constructing, operating, and maintaining . . . project works necessary or convenient for the . . . utilization of power across, along, *from* or in any of the navigable waters. . . ." 59 CONG. REC. 1482 (1920) (emphasis added). Senator Wadsworth stated that the purpose of his amendment was "obvious" since "it would seem that the word 'from' should be added, so that in the event of diversion of water to a distance from the stream, which could not be called 'along' the stream, the case would be covered." *Id.* It is therefore arguable that Congress, by replacing the word "at" with "from," did not intend to reach plants downstream from the govern-

ment dam. In light of the summary agreement to the Wadsworth amendment, it may be contended that Congress intended by its use of the word "from" in the surplus water clause, to reach plants which diverted water stored at a government dam to a distance inland from the site, rather than plants which were located downstream from the dam.

The congressional debate on the 1920 Act does, however, show that the Act was viewed by the legislators as regulating only water-power development. Congressman Bankhead hailed the bill, H.R. 3184, as a means of placing "the great latent, potential water powers of this country . . . into practical business operation for the benefit of the people and of the industries of the country. . . ." 58 CONG. REC. 2025 (1919). Congressman Anderson observed that the House was "undertaking here to pass a general bill covering water powers in navigable streams and on public lands and in the forests. . . ." *Id.* at 2133. Finally, Congressman Esch, floor manager of H.R. 3184, in the House, stated that "[t]here are many provisions in this bill giving the [federal power] commission power to grant licenses to such applicants as will best develop the water powers of the region. . . ." *Id.* at 2035.

The notion that H.R. 3184 was intended by Congress to regulate only the development of water power is reinforced by consideration of the House deliberations on several sections of the bill. House consideration of Section 4(d) of H.R. 3184 (Section 4(d) corresponds to what is now Section 4(e) of Part I of the Federal Power Act), the section which is argued to provide the FPC with jurisdiction to license steam plants, demonstrates a concern with only the issues related to water

power development. Congressman White, concerned over FPC authority granted in Section 4(d), inquired of Congressman Esch "whether [the commission] would have authority to authorize the construction of a dam which would throw out some existing and going structure up the stream?" *Id.* at 2035. Mr. Esch replied:

> "There are many provisions in this bill giving the commission power to grant licenses to such applicants as will best develop the water powers of the region, and with such power granted to the commission it might be that they would grant a license to a lower builder of a dam, even though it might entail loss to the upper owner of a dam. Of course it would be subject to the payment of damages. I doubt, however, whether the commission would exercise such power to any considerable extent." *Id.*

Later in the debate, Congressman Small offered an amendment to Section 4(d) which would delete the exception of government dams constructed prior to passage in the proviso:

> "That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to the passage of this act." *Id.* at 2036.

Congressman Small was concerned with "a number of Government dams which have heretofore been con-

structed and which are not now being utilized for water power for lack of general legislation." *Id.* Congressman Anderson opposed the Small proposal, arguing:

> "In the case of the dams to be constructed in the future, the question which this particular section raises comes up at the inception of the application for the improvement. Consequently there is no particular harm done to anybody by providing that in that case there should be a period of two years elapse in order that Congress may have an opportunity to determine what it will do with respect to that dam. But in the case of a dam already constructed, the amendment of the gentleman from North Carolina simply means that there must be a delay of two years before anything can be done under the bill with respect to the power created by the Government dam, although the dam is entirely completed and ready for the installation of the power machinery. I can see no reason on earth why, under the circumstances created under this bill, where the commission has full authority over the rate charges and everything else connected with the dam, that there should be a delay of two years before you can utilize the power created by the dams already constructed." *Id.* at 2037.

Congressman Esch agreed with Mr. Anderson, noting that "[t]here are very few Government dams on which it is possible to develop power." *Id.* The Small proposal was rejected. *Id.* The House debate on Section 4(d) contains no reference to steam-power plants and, in fact, demonstrates a congressional concern only for the problems incidental to hydro-power developments.

As reported to the House floor, Section 7 applied in general terms to the "issuing [of] preliminary permits hereunder or licenses where no preliminary permits

have been issued. . . ." *See id.* at 2037. The second paragraph of Section 7 provided as follows:

> "That whenever, in the judgment of the commission, the development of any project should be undertaken by the United States itself, the commission shall not approve any application for such project by any citizen, association, corporation, State, or municipality, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the project as it may deem necessary, and shall submit its findings to Congress with such recommendations as it may deem appropriate concerning the construction of such project or completion of any project upon any Government dam by the United States." *Id.*

An amendment was offered by Congressman Small to strike out this paragraph. *Id.* at 2038. Debate on the proposed amendment demonstrates that this generally worded section was interpreted by the congressmen as anticipating only Federal Power Commission jurisdiction to regulate water power development. Thus Congressman Small inquires of Congressman Esch:

> "As I interpret [the second paragraph in section 7] it reposes with the commission the right to express their judgment as to whether the development of water power upon a certain stream should be undertaken by the United States rather than issuing license to a person, corporation, and so forth?
>
> "Mr. ESCH. Yes.
>
> "Mr. SMALL. If it is their judgment that the development of water power should be undertaken by the United States, that they shall not issue a license but report to Congress?
>
> "Mr. ESCH. Yes." *Id.* at 2038.

Congressman Small then argues:

> "[I]f this body is in favor of the development of water power by the United States, or even if it is a debatable question in the committee, let the paragraph stay in; but I understand the contrary is true, and that this bill was predicated upon the theory that it would invite private capital, through the agencies of individuals and corporations and municipalities and other State agencies, to develop water power, and that it is expected that capital will respond to this invitation, and that water power will be developed. If that be true, why should Congress repose in three men the right to hold up the license for water power, all other conditions being favorable for the issuing of a license, because, forsooth, in their opinion the United States ought itself to develop the water power?" *Id.*

Mr. Small's rhetorical question was answered by Congressman Sims:

> "[T]he commission is not authorized to expend money in development. The commission may, however, when an application is made to it for a license to build a navigation project or to build a water power upon Government-owned land, if it deems it in the public interest that the Government as far as it will for the cost increase, withhold the license and recommend to Congress that the Government make the improvement." *Id.*

Following the rejection of Congressman Small's proposed amendment to the second paragraph of Section 7, *id.* at 2039, Congressman McLaughlin of Michigan offered an amendment to the first paragraph of Section 7. The first paragraph of the section provided:

> "That in issuing preliminary permits hereunder or licenses where no preliminary permit has been

> issued the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plants of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region." *Id.* at 2037.

Congressman McLaughlin's amendment proposed to limit the preference given states and municipalities to the case where "such power is to be used by such States or municipalities for State or municipal purposes." *Id.* at 2039. Mr. McLaughlin believed:

> "... that states and municipalities should have the authority and should be given the preference to develop water power for their own use, but I do not believe that they should be permitted to develop water power for the purpose of going into the business of selling power, to engage in commercial propositions." *Id.*

Mr. McLaughlin further stated the purpose of his amendment was:

> "... to limit States and municipalities, in the development of water power, to do so for their own uses, and that they shall not develop water power primarily for the purpose of engaging in the business of making and distributing power." *Id.*

Congressman Sims opposed the amendment, arguing:

> "The ... amendment would prevent a city or town from applying for a license and developing

> water power unless the city at the time it applied for it had need, for purely municipal purposes, for the whole amount of power to be developed." *Id.*

The amendment was rejected. *Id:* at 2040.

Section 10(e) of H.R. 3184 extended authority to the FPC to fix reasonable annual charges to be paid by all licensees. House debate on this section shows that a "licensee" was contemplated to be a water-power developer. Congressman Haugen offered an amendment to Section 10(e) which proposed to delete the language granting the FPC authority to fix these charges. *Id.* at 2136. Mr. Haugen's purpose was to insure that "consumers of the power will pay less for the use of the water power than they would under the plan suggested." *Id.* The amendment was rejected, *id.* at 2136. Congressman Little then offered an amendment to Section 10(e) which proposed to permit a readjustment by the Federal Power Commission of charges to the power companies at the end of 20 years and subsequently at the end of periods not exceeding 10 years for "all" licenses issued by the Commission. See *id.* at 2221 (remarks of Congressmen Small and Little). This proposal sparked a heated debate. Congressman Small opposed the amendment, arguing:

> "The purpose of this entire bill is to attract capital for investment in water-power development upon such conditions that shall be just to the United States. Unless both purposes are met in this bill, there will be no result, and we will be confronted by the same conditions that have existed for a long period of years. No capital will be invited and there will be no investment in water power. Members understand very well that even now we have water-power legislation, legislation which it was

> contemplated at the time it was enacted would invite capital, but it has not done so, and no water power is being developed. This bill was drafted for two purposes—one to attract capital in the development of water power under such terms as might be just to the United States . . . ." *Id.*

Congressman Small further remarked that this:

> "... amendment applies to every license issued for the development of water power, reposes in the commission the discretion to require an adjustment at the end of 20 years and then an adjustment at every 10-year period thereafter. Bonds are to be issued by these companies. It takes great capital in the development of water power, and those bonds, it may be assumed, will run 20 years, 30 years, perhaps 40 years, and capital will not be invested in those bonds nor in the stock of the company which is seeking a license. In other words, capital will not be invested in development of water power if the license to be issued carries any such condition as that provided in the amendment . . . and one of the features intended to be accomplished by this bill will have failed if that amendment shall be adopted." *Id.* at 2222.

Congressman Ferris maintained that the Little proposal is within the Commission's power, as provided for in other clauses of the bill:

> "[T]his commission is clothed with full power, with full authority to insert in the contract, which is a binding contract between the water-power developer and the Government, any condition they may desire. . . .
>
> * * * * *
>
> "In the stage of water-power development as it is now, I think there will be many cases when the

developer is entitled to know in the beginning, on any unconstructed water-power site, something of what is going to happen to him during the life of his franchise. He can not secure money to build it without some assurances as to what will happen clear through. The commission is given the very widest powers and they will safeguard the public and at the same time be reasonable so as to get development." *Id.*

Congressman McArthur spoke against the Little proposal and explained the adverse effect he felt the amendment would have on hydroelectric developers:

"[I]n the development of hydroelectric power two elements are essential. First, we must have the power to develop; and second, we must have the money with which to develop it. We have in this country untold millions of hydroelectric power now going to waste, and it is a burning shame that Congress has not already passed legislation to permit the development of this power for commercial and other purposes.

* * * * *

"[T]he developers of hydroelectric energy, when they have water-power developments in view, must go on the market and compete with other business propositions in the effort to secure credit and capital. And they are not going to be able to go into the market and get their money unless they have something to show from which a reasonable re-something to show from which a reasonable return may be expected.

* * * * *

"I hope all of these amendments that are put on here with a view to restricting development and making it harder to raise money to develop hydroelectric energy will be voted down and that the

> committee will be sustained all through this bill, a bill almost identical to that which passed the House in the last Congress and got as far as conference in the Senate, where it was blocked." *Id.* at 2222-23.

The Little amendment was rejected by the House. *Id.* at 2223.

Amendments offered to certain other subsections of Section 10 support the view that the section, in its entirety, was intended to reach solely water power development. Congressman Mays, in offering an amendment which would provide that transmission lines constructed or operated under the act would be treated as common carriers, compared and contrasted the present bill with legislation dealing with coal.

> "In the legislation dealing with our coal resources a provision was carried that only one lease could be secured by any individual or corporation each holding a lease. . . . There is nothing in the bill, so far as I can observe, to prevent existing or future monopolies from securing all the *undeveloped power sites* yet remaining upon the public domain or along the navigable streams of the country. . . . Coal is carried on railroads acting as common carriers. It represents heat, light, and power. It may be burned at the mines and transmitted over the lines to the consumer in the form of electricity. *Water power* is heat, light, and power, minus the ashes and smoke. It serves the public in the same manner as coke and fuel oil. The railroads carrying coal, the pipe lines carrying oil, must operate as common carriers. Manifestly the same rule should apply to transmission lines doing interstate business." *Id.* at 2136-37 (emphasis added).

The Mays proposal was rejected. *Id.* at 2137. Congressman Briggs then offered an amendment which would attach a "penalty clause to section 10(h) by saying that holders shall forfeit all permits or licenses that they may have upon conviction of a violation of this provision against monopoly. . . . [and] that any such offender shall also be liable for any other penalties that may be provided by law." *Id.* at 2138 (remarks of Congressman Briggs). Mr. Briggs' amendment was grounded on the opinion that:

> "[N]o stronger penalty could be attached than a forfeiture of the license or permit held by the body seeking to create a monopoly of the water power. Through the instrumentality of licenses, which may run for 50 years, and of permits, by which they may hold preference rights or options for a term, even as long as three years, to acquire such licenses and privileges of water power, and through subsidiary corporations or by dummy persons some combinations of capital may accomplish a monopoly that never could be tolerated in this country. . . .
>
> "When the incalculable value of the water power of this country is considered, every precaution ought to be observed in order that this great asset of the people should not be appropriated by private interests for selfish ends. It is to be expected that resistance will be met in the effort to impose safeguards around anything so tremendously attractive and desirable to those seeking monopoly of the water power of the United States. . . .
>
> "It must not be forgotten that the amount of waterpower which can be utilized in this country is almost fabulous.
>
> ". . . [W]hile development of our great waterpower resources ought to be encouraged, so that

> their tremendous energy, which now runs to waste, can be harnessed and made to serve the needs of the people, it should not be done at a cost which might threaten to completely absorb the very holdings themselves." *Id.*

The Briggs proposal was rejected. *Id.* at 2139.

House debate on Section 12 of H.R. 3184 and the amendments proposed thereto provide another example of broad wording interpreted by the legislators as encompassing merely water-power facilities. Section 12, as reported to the House, provided:

> "That whatever application is filed for a project hereunder involving navigable waters of the United States, and the commission shall find upon investigation that the needs of navigation require the construction of a lock or locks or other navigation structures, and that such structures can not, consistent with a reasonable investment cost to the applicant, be provided in the manner specified in section 11, subsection (a) hereof, the commission may, before taking action upon such application, cause a report upon such project to be prepared, with estimates of cost of the power development and of the navigation structures, and shall submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in the cost of construction of such navigation structures." *Id.* at 2220.

Congressman Lankford offered an amendment which proposed to insert the following after the final word of the section:

> "Whenever it is made satisfactory to the commission that the needs of navigation can be provided for in a way profitable to the United States

> by the joint activity of the United States and a State or States, or municipality or municipalities, or other interested parties, and that an essential water power and a needed navigable waterway can be obtained by the performance of a contract whereby the United States makes certain improvements, provided the other interested contracting parties do the things obligated to be done, then the commission shall cause the necessary surveys to be made, the necessary data obtained, and the necessary estimates made to determine the things which can be profitably done by the United States and other contracting parties and may recommend to Congress that the United States obligate to make certain improvements in said scheme of water-power and waterway development, provided a satisfactory contract is entered into by the other contracting party to complete said development." *Id.*

In support of his proposed amendment, Mr. Lankford argued thus:

> "There are provisions in the bill for the United States to make improvements for the purpose of helping navigation and for the purpose of constructing better water power. There are provisions for municipalities to be authorized by the commission to make improvements, to develop water power, and to develop navigation. There are provisions for corporations to make these improvements. I have offered the proposed amendment, therefore, to permit the United States Government to act in connection with the States or with municipalities or with corporations in making the improvements necessary to construct better waterways and to develop better water power. . . . [A]n essential water power and a needed navigable waterway can be obtained by the performance of a contract whereby the United States makes certain improvements, provided the other inter-

> ested contracting parties do the things obligated to be done . . . ." *Id.*

Congressman Green opposed the bill, explaining:

> "The principal object of this bill is to make unnecessary for the Government to expend money in developing water power. I do not believe this Government ought at this time to enter into any further projects. . . . As for the Government helping the States to carry out this matter—to increase water power—I think we have done enough in that line." *Id.*

Finally, consideration of House debate on Section 17, which allocated fifty percent of certain "charges arising from licenses hereunder . . ." to special funds, provides further evidence that such a "license hereunder" pertains to hydro-power development. As reported to the House floor, Section 17 read:

> "That the charges arising from licenses hereunder shall be paid into the Treasury of the United States. Fifty per cent of the charges arising from licenses hereunder for the occupancy and use of national forests is hereby reserved and appropriated as a special fund in the Treasury to be expended under the direction of the Secretary of Agriculture in the survey, construction, and maintenance of roads and trails within such national forests. Fifty per cent of the charges arising from licenses hereunder for the occupancy and use of national parks is hereby reserved and appropriated as a special fund in the Treasury, to be expended under the direction of the Secretary of the Interior in the improvement and development of such parks. Fifty per cent of the charges arising from licenses hereunder for the occupancy and use of public lands, and of national monuments, and power site or other reserves outside of national

> forests shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress approved June 17, 1902, known as the reclamation act. All proceeds from any Indian reservation shall be placed to the credit of the Indians of such reservation. Fifty per cent of the charges arising from all other licenses hereunder is hereby reserved and appropriated as a special fund in the Treasury to be expended under the direction of the Secretary of War in the maintenance and operation of dams and other navigation structures owned by the United States, or in the construction, maintenance, or operation of headwater or other improvements of navigable waters of the United States." *Id.* at 2226.

Debate centered on an amendment offered by Congressman Walsh which proposed to abolish these funds. Mr. Walsh felt that treasury receipts should be uncommitted, especially in light of his expectation that when:

> ". . . this bill becomes a law we will see enormous development of water power in this country and that it will revolutionize the hydroelectric power plants of the country and result in the payment into the Treasury of the United States of many hundreds of thousands of dollars." *Id.* at 2236.

Congressman Ferris opposed the Walsh proposal, arguing:

> "[S]ection 17 has to do with the receipts from royalties or rentals on the franchises herein granted. There are approximately 165,000,000 acres of forest reserves in the country. Many water power sites are on those forest reserves. They are to be developed under this bill. They are scattered throughout the 17 public land States of the West. This bill provides that 50 per cent

> of the receipts of this water power development shall go to the development of those forests, the construction of roads, the prevention of forest fires, and improvements generally. [Congressman Walsh] would take that away from them. . . .
>
> "Now, passing from that the next provision is that 50 per cent of the royalty or rentals is to be expended upon the national parks. There are some 30 or 40 national parks and monuments, the Nation's playgrounds, and every citizen of the Republic is interested in their beautification, their preservation, and development. This bill provides that 50 per cent of the proceeds of the water power developed in these 30 or 40 national parks shall be expended for the beautification of the Nation's playgrounds. Again, the gentleman, by his amendment, would strike them down; again he would denude them—strip them—throttle them—deny them. Mr. Chairman, there are about 335,000,000 acres of public lands in the United States, and about 370,000,000 acres in Alaska, 700,000,000 acres in all, and they have many water-power sites on them and this provides that 50 per cent of the water power or receipts of the water power developed on those public lands shall go to the development of the roads and schools in those sparsely settled States. [Congressman Walsh], with all of his earnestness and zeal, would take that away from the States." *Id.*

The Walsh proposal was rejected. *Id.* at 2237. See Senate debate on proposed amendments to Section 17 indicated that the phrase "charges arising from licenses hereunder" was interpreted to refer to "remuneration from those who use water power . . . " 59 CONG. REC. 1475 (1920) (remarks of Senator Lenroot), and to "funds that are derived from water power . . . ," *id.* at 1477 (remarks of Senator Nelson). *See also* 58 CONG. REC. 2242-43 (1919), wherein the House debate on

Section 24 of H.R. 3184, which applies broadly to "any proposed project under the provisions of this act . . . ," indicates the view that the section countenanced merely "the water-power applicant." *Id.* at 2243 (remarks of Congressman Elston.)

Thus, House debate on H.R. 3184 demonstrates a congressional intent to deal merely with water-power development in the present bill. This is shown both by general remarks made by the members when discussing the nature of H.R. 3184, and by a consistent interpretation by House members of general provisions dealing with 'licenses (or projects) hereunder" as referring to hydro-power facilities.

Senators apparently shared the view that, as passed by the House, H.R. 3184 dealt merely with the regulation of hydro-power. Thus, in giving a general introduction to the bill for his colleagues, Senator Jones referred to H.R. 3184 as the "water-power legislation." 59 CONG. REC. 241 (1919). In his rather lengthy speech advocating Senate passage of the bill, Senator Jones mentioned only the necessity of providing for hydro-power development. For example, he asserts that:

> "If 40 years ago, instead of enacting restrictive laws which have prohibited development of our water powers, Congress had invited their development through fair and reasonable terms, the beginning of the World War would have found the United States with 20,000,000 developed hydro-electric power [horsepower], instead of 5,000,000.
>
> " . . . Every undeveloped water power for which a market now exists represents a waste of an inexhaustible natural resource." *Id.*

* * * * *

"The necessity for the development of our water power is of paramount importance to the people of the United States, and Congress should enact a law without further delay the terms of which will make the investment of capital safe and not prevent a reasonable return.

"The bill now before the Senate is perhaps too restrictive in terms and requirements it imposes on the capital invested and upon the details of operation, but water-power men tell me they can work under it, and I trust that the Senate may pass the committee bill without in any way making its terms more onerous." *Id.* at 244.

The conclusion that Mr. Jones views the House-passed bill as pertaining to water-power development to the exclusion of energy developed by other power sources is supported by the following remarks:

"[In the State of Washington], coal is mined and steam-power plants are operated within the sound of descending waters, and trainloads of coal are imported each day from British Columbia.

* * * * *

"The utilization of even one-third of the enormous amount of energy latent but now wasting in our falling waters would make the United States the greatest manufacturing country of the world. The development of our water powers is intimately connected with the solution of such great national problems as the national defense; extension of inland waterways; shortage of food, conservation of coal, oil and labor; irrigation of arid lands; and railroad car shortage. In addition to conserving vast quantities of coal and labor to mine and handle it, the hydroelectric energy existing in our running waters will, when developed, be utilized in . . . manufacture. . . ." *Id.* at 241.

In his synopsis of the House-passed bill, Senator Jones delineated the powers conveyed to the Federal Power Commission, indicating jurisdiction merely over water-power development:

> "The bill creates a Federal water-power commission consisting of the Secretaries of War, Interior and Agriculture, to which is given authority over all matters over which the Federal Government has jurisdiction, pertaining to the development of water powers in navigable streams and the improvement of navigation incident thereto, over the development of water power in the public domain, and the development of water power in the national forests. Under the laws now in force the development of water powers contained in navigable streams is under the jurisdiction of the War Department, those in the public domain are under the Interior Department, and those in the national forests are under the Department of Agriculture. The establishment of this commission, according to those who strongly favor it, would promote unity of action, together with economy of operation, through segregating all authority in this board, whose members would bring to its aid the personnel and vast machinery of the three great governmental departments over which they preside." *Id.* at 244.

Senator Jones, in outlining the preferences given the federal and local governments mentioned only the development of hydro-power:

> "It will thus be seen that under the terms of the act the Federal Government has, through its commission, the first right to develop any of the water powers under its jurisdiction. Should the Federal Government elect not to do so, then States and municipalities are accorded a preference right to licenses on even terms over citizens, associations

> of citizens, or corporations organized under the laws of the United States or any of the States thereof. Neither the Federal Government, the States, nor municipalities would pay any charges in event of their developing water power, and the entire burden of sustaining the cost of administration of the act, in addition to payment for use of Government lands, would fall upon such citizens and private corporations as cared to enter the field of water-power development." *Id.* at 246.

Senator Jones bemoaned what he considered to be the excessive restriction on private hydro-power development, but indicated that the water-power industry was capable of operating under the bill:

> "The Government . . . is securing a tremendous bargain if it can induce the development of the water powers of the country under the terms of this bill. And, indeed, such restrictive terms as I have set forth, and which are contained in this act, do not constitute a very attractive proposition to enterprising men and to capital; but, as I said before, water-power men tell me they can work under it, and so I hope we may soon pass it." *Id.*

The introductory remarks of Senator Nelson further indicate that Congress viewed the FPC as a "water-power" commission:

> ". . . The pending bill provides for the establishment of a *water-power commission*, consisting of the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of War. . . . The *water-power commission* thus created is given authority to act within the scope of the bill." *Id.* at 1041 (emphasis added).

Mr. Nelson indicates that the provision for temporary permits in the bill applied merely to the construction

of "any dam or works for the development of water power." *Id.* Similarly, the licensing provision was seen as encompassing "water-power rights." Senator Nelson indirectly referred to the surplus water clause in what is presently Section 4(e) of the Act when he drew the following distinctions:

> "There are two classes of dams. Where a dam is constructed by the Federal Government for purposes of navigation, and *there is a surplus power to be disposed of that ought to be utilized, in that case the Federal Government having constructed the dam, and by the construction of it having created a water power, manifestly the Government is entitled to full compensation for the use of that power.* But where the Government has simply issued a license to a man, giving him permission to build a dam with his own money, his own capital, his own resources; in that case I have always believed, and that has been the view of the majority of the Senate, that the Government is not fairly and equitably entitled to any pay for the use of the water. If any compensation is to be made for the use of the water, it belongs to the States or to the riparian owners." *Id.* (emphasis added).

It is clear that Mr. Nelson contemplates only the use of surplus water to develop hydro-power.

The remarks of Senator Chamberlain provide further evidence that one prime motivation for the passage of H.R. 3184 was the need to develop hydroelectric power as a means of conserving a dwindling coal supply:

> "[W]ater-power legislation can not be considered a local or a sectional question. To encourage water-power development is a national duty. It concerns every citizen of the United States,

whether he dwells in the vicinity of a water power, in a city, or upon the plains of Iowa. . . .

* * * * *

"Coal shortage brings up again the folly of leaving unused the Nation's vast resources of water power. The more these are developed the less desperate will be the fuel stringency. The waste is not alone one of money. It extends in its final direct results to public health and life itself as these are affected by the inability to get coal for heating and for the production of the necessaries of life." *Id.* at 1223.

Senator Chamberlain estimated that 100 million tons of coal per year would be saved if the available water-power were developed. *Id.* Mr. Chamberlain is not, of course, asserting that coal conservation is provided for in the bill; he merely points out it will be a beneficial result of the development of hydro-power. Thus, he concludes:

"All the available water power should be developed and in the quickest time possible, in the interest of the economic uplift of the country, of its social regeneration, and of its wealth, and in order to permit it to secure its share of the markets of the world. Hydroelectric energy gives us the means of saving our coal, enables us to obtain electricity at a low price, to lower in many cases our industrial costs of production, and to empower our agriculture. It will become the surest weapon in the economic struggle which faces us." *Id.* at 1224.

An argument by Senator Lenroot in opposition to a proposed amendment which would require a new licensee to pay severance damages to a former licensee at least implicitly demonstrates that the licensing of steam plants are not within FPC authority. Senator

Lenroot maintained that a requirement to pay severance damages would cause a lease to, in effect, be perpetual. To illustrate, Senator Lenroot propounded the following hypothetical:

> ". . . If a licensee is enabled to produce water power for $10 per horsepower and steam cost him $20 per horsepower, and by reason of the expiration of his license a new licensee comes in and takes it over, the licensee will have to build a steam plant to supply that amount of power, which will cost him twice as much as the water power. . . ." *Id.* at 1473.

Senator Lenroot argued that in the above case the new licensee, in order to take over the property, would be required to pay the licensee $10 per horsepower for an indefinite time in the future. *Id.* Senator Lenroot's hypothetical is of interest because he assumed a licensee is one who is operating a water-power facility, and that a new license having been issued, the opportunity for the former licensee to produce hydro-power will no longer exist. Producing power in a steam plant is assumed to be available, perhaps because the FPC has no power to license its use, and therefore no authority to withhold permission for its operation.

General remarks made on the Senate floor at various points during the debate indicate that H.R. 3184 was designed to deal solely with the regulation of hydro-power. Senator Harrison described the bill as "water-power legislation" and states the purpose of H.R. 3184 thus:

"This bill was designed to develop water power from the navigable streams and on the public domain in the United States. It was to encourage water-power development." *Id.* at 1483. Similarly, Senator Nelson

refers to H.R. 3184 as the "water-power bill now pending," and to the FPC as the "water-power commission." *Id.* at 1493. He described the FPC as follows:

> "Under this bill there is created a great *water-power commission* consisting of the heads of three of the great departments of the Government—the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. That commission is to pass on all *water-power questions* in the entire country. . . ." *Id.* at 1493 (emphasis added).

Mr. Nelson answered the conservationists who had maintained that the bill provided for too great an incentive to the hydro-power companies thus:

> "[I]t is idle, it is mere camouflage, to say that we are giving away millions and millions of dollars of water power to water-power companies. We are giving it away to the people of the States and to their representatives. . . .
>
> * * * * *
>
> "These great corporations are needed for the development of water power, and the obstacle to water-power development that has intervened now for 10 years has created a monopoly in this country by leaving it to those who own now-existing dams. By holding up legislation, by preventing legislation for water-power development for 10 years, those that were fortunate enough to have water powers before that time have had a monopoly of it, and they are anxious to continue the monopoly. . . ." *Id.*

Senate debate on two proposed amendments to Section 10(e) supports the conclusion that the Congress intended that "licensees" under the bill were to be only hydro-power developers. The first amendment was

proposed by the Senate Commerce Committee, and provided that Section 10(e), as passed by the House, be replaced with a provision which would prove less costly to the hydro-power corporations. The proposed amendment was to replace:

> "That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission. When licenses are issued that contemplate the use of Government dams or other structures owned by the United States, in the discretion of the commission, the charges to be paid by the licensee may be readjusted at the end of 20 years after the beginning of operations and at periods of not less than 10 years thereafter, in a manner to be described in each license." *Id.* at 1429,

with:

> "That the licensee shall pay for the license herein granted such reasonable annual charges as may be fixed by the commission for the purpose of reimbursing the United States for the cost of administration of the act in relation to water powers developed under its jurisdiction, in the proportion that the water power developed by the project covered by said license bears to the total water power developed by all projects licensed under the act, and for that purpose such charges may be readjusted from time to time, not oftener than once in two years; the licensee shall also pay for the use and occupation of any public lands and lands in reservations, except tribal lands embraced within Indian reservations, necessary for the development of the project covered by the license such reasonable annual charges based upon the actual value of the Government lands used as may be fixed by the commission, but in no event shall the annual charge for the foregoing exceed 25 cents per developed horsepower: *Provided,* That when licenses are issued involving the use of Govern-

> ment dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of 20 years after the beginning of operations and at periods of not less than 10 years thereafter in a manner to be described in each license." *Id.*

The proposal sparked a heated debate. Senator Lenroot argued that the committee amendment constituted "a clear gift of hundreds of millions of dollars to the water-power corporations of the country, without any return to the public." *Id.* Senator Lenroot alluded to a hypothetical discussed earlier by him, wherein he illustrated a situation in which a savings to the water power company will not affect the rates charged to the consumer. The Senator assumed a city that utilizes 15,000 horsepower, 5,000 of which "is produced from a dam licensed *under this act*, . . . [and] the other 10,000 horsepower is produced by steam." *Id.* at 1101 (emphasis added). Senator Lenroot's point is that the Commission, in this situation, will permit a rate charged by the water-power utility which would enable the steam-power utility, with a higher cost of operations, to exist and pay a fair return. *Id.* Whether Senator Lenroot's thesis is correct, for the purposes of this case, is unimportant. It is important, however, that the senator appeared to view only the water-power plant to be licensed "under this act." The debate on Senator Lenroot's hypothetical did not question this assumption. *See id.* at 1430-31. It is abundantly clear from Senator Lenroot's argument that he views Section 10(e) as affecting only "water powers," and the "water-power utility." *See id.* at 1430. Senator Nelson supported the proposed amendment, arguing that "[i]t goes without

saying that all the burdens put upon water power in these cases will ultimately come out of the consumer in one form or another." *Id.* Senator Nelson categorized Senator Lenroot's hypothetical as "an extravagant and unreasonable case," and maintained:

> "Those cases are very few and far between. I desire to say that where *water power* is developed and electric power is thereby secured in the neighborhood, it is not likely that any steam plant will be started in competition with it, for it can not compete with it." *Id.* (emphasis added).

Senator Nelson's constant references to "water powers" and "water-power development" show the scope of Section 10(e) he intended. Finally, Senator Norris endorsed Senator Lenroot's argument stating that:

> ". . . this commission in that case [should] charge a rate for a license for the development of the power that comes from the water that will be sufficient to make up the difference; otherwise the company developing the water power would make all of the difference, and the people of the immediate vicinity would get no benefit whatever from it." *Id.* at 1431.

Throughout Senator Norris' speech references to "water power" and "the water-power people" were abundant. *See id.* Although the Commerce Committee proposal was rejected on January 12, 1920, *id.* at 1432, it was reoffered in the Senate on January 15, 1920, by Senator Nelson, who reminded his colleagues that it related "to the compensation for the use of water powers built by private capital and not by the Government." *Id.* at 1571. The amendment was agreed to. *Id.* at 1573.

Senate debate on an amendment offered by Senator Nugent which would provide that Section 10(e) allow the tribal council veto power over any license authorization "in case of tribal lands embraced within an Indian reservation, which said lands were ceded to the Indians by the United States by treaty." *Id.* at 1564. Senator Walsh, in support of his opposition to the Nugent proposal, included in the *Record* a portion of a letter received from the Secretary of the Interior, which read, in relevant part:

> "The *general water-power bill,* H.R. 3184, which has passed the House of Representatives and been favorably reported by the Senate Committee on Interstate Commerce, provided a general and comprehensive plan for the leasing and development of water-power sites upon public lands, Indian reservations, and navigable streams to be controlled by a commission composed of the Secretaries of War, Agriculture and Interior. The proceeds received from such developments on Indian reservations are, under that measure, to go to the benefit of the Indians concerned. That measure amply takes care of the matter of leasing and use of such sites in Indian reservations, and in my opinion this bill should go no further than to reserve the sites and should impose no restrictions of conditions upon the leasing thereof." *Id.* (emphasis added).

Senator Myers joined Senator Walsh in opposition to the amendment, arguing:

> "If this amendment become a law, it would be in the power of a tribe of Indians, arbitrarily and without any reason whatever, to block a *project for water power development . . . .*" *Id.* at 1565 (emphasis added).

Senator Nugent, in defending his proposed amendment, was clearly concerned with the "water-power sites on

Indian reservations throughout the country that will be affected by this bill." *Id.* at 1566. The amendment was agreed to. *Id.* at 1570. Further evidence that Section 10(e) was intended by those concerned with this bill to reach no further than hydro-power development is found in a letter from Gifford Pinchot to Senator Gronna, dated January 5, 1920. The letter reads, in relevant part:

> "I am writing to call your special attention to the *water-power bill* (H.R. 3184).... This bill will settle the disposition of all our remaining public *water powers*....
>
> "*Section 10(e)* gives the *public water powers* away for practically nothing by relieving *licensees* from paying the reasonable value of what they get from the public. It limits the possible charge to the reimbursement of the Government for the expenses of administering the act, plus a small charge based on the value of Government lands occupied, irrespective of their *water-power possibilities.* Thus it prevents any charge being made for the enormously valuable *water-power rights* to be granted under the bill. When a municipality is to develop and use the power for its citizens a nominal charge is right and just, but when a corporation or individual is to be given publicly owned rights and make a profit from them it is clear beyond question that a reasonable charge, based on the value given, should be made.
>
> "The right to make such a charge is clear. To abandon it for the profit of the corporations would be wholly unjustifiable. The *water-power commission* should be given a free hand to charge what the rights granted are actually worth. This grave defect in the bill can be remedied by striking out the Senate committee amendment." *Id.* at 1573 (emphasis added).

There is no mention that Section 10(e) is to reach beyond water power development.

Finally, debate on a proposed amendment to H.R. 3184 which would provide "[t]hat this act shall not take effect until the expiration of three years from and after its approval by the President" indicates that "this act" provides only for water-power development. *Id.* at 1571. Senator Nugent offered the amendment because he was:

> ". . . very strongly of the opinion that the States and the counties, municipalities, and other political subdivisions of the States in which these *water-power sites* are situated should have the right to develop them for the use of the people of those States, counties or municipalities, as the case may be. According to my understanding of this bill, it contains a provision to the effect that municipalities, counties, and so on, may make application for licenses. But it occurred to me that if this bill is enacted and becomes effective within a short time, shortly thereafter practically all of the desirable sites will have been applied for by private interests.
>
> * * * * *
>
> "So far as the counties and the municipalities in Idaho are concerned, I doubt very much, although I have no definite information on the subject, *whether there is one among them that can now take out a license for the development of a water-power site. . . .*" *Id.* (emphasis added).

This amendment was opposed by Senator Nelson, who argued:

> "The country has been suffering for 8 to 10 years for the lack of *water-power* legislation. All *water-power development* has been at a standstill, and this amendment would postpone it for another three years, leaving it as though no law had been enacted. It would stay *water-power development* in Idaho, just as well as in every other State, for men who

> seek to develop *water power* want to be assured that the Government will give them permission, and without that there will be an absolute stay of all development. The amendment amounts simply to postponing the work of *water-power development* in this country for another three years, and it ought to be rejected." *Id.* (emphasis added).

The equation between the area covered by "this act" and "water-power development" could not be made more forcibly.

The conference report on H.R. 3184 was first considered by the House. *See id.* at 6381-83. The statement of the House conferees, in explaining the action of the Conference Committee, provides further evidence that the bill in general, and Section 10(e) in particular, was intended by Congress to deal only with water power development. With respect to the tribal lands amendment to Section 10(e), it was indicated that the Senate conferees receded from the amendment since the conferees "saw no reason why *water-power use* should be singled out from all other uses of Indian reservation land for special action of the council of the tribe." *Id.* at 6383 (emphasis added). In addition, the conference committee proposed a compromise Section 10(e) which contained elements of both the House and Senate versions. Section 10(e) was described as relating "to the charge imposed upon the licensee for water power developed." *Id.* at 6384. In Congressman Esch's explanation of the Conference report to his colleagues in the House, he reiterated that Section 10(e) related "to the charges for water-power development." *Id.* at 6524. In another context, Congressman Esch, in speaking of Section 17, referred to these charges as "charges derived from water-power development." *Id.* at 6524. *See*

also id., where Mr. Esch explained that the conferees "did not believe it would be advisable to [provide for federal construction of a hydro-power project at Great Falls, Maryland] through an amendment to a general water power bill . . . ." Congressman Sims opposed the compromise by the Conference Committee on Section 10(e), referring to it as "the bone of contention in every water-power fight we have ever had on this floor and in the Senate." *Id.* at 6525.

General comments made by members of the House concerning the conference report indicate that H.R. 3184 was, indeed, a "water-power bill." Congressman Treadway congratulated the conferees that "finally . . . a water-power bill has been reported that both branches seem to have agreed upon," and that provides for cooperation "between private owners and the Government for the use of the water power on navigable streams." *Id.* at 6527. Congressman Lee was equally pleased with the efforts of the Conference Committee in reporting the "water-power bill." *Id.* at 6527. His description of the bill contains many references to "water power rights." *See id.* at 6527-28. Congressman Lee, in a passing reference to Section 12, implies that perhaps the surplus water clause in Section 4(e) was intended to apply only to hydro-power uses "at" a government dam. Congressman Lee states:

> ". . . The bill provides that if the commission shall find that the *power available at any Government dam* may be advantageously used by the United States itself, or that any specific project should be developed by the United States, it shall not approve any application by any other agency, but shall report to Congress with recommendations for Government construction." *Id.* at 6527 (emphasis added).

Congressman Taylor expressed the view that H.R. 3184 protected the government and the rights of the people, while encouraging and protecting "investments in water-power development . . . ." *Id.* at 6528. Congressman Raker agreed that the legislation provided for the "proper development of the great water powers of the United States. . . ." *Id.* at 6529. Congressman Mondell felt that this "Federal legislation regulating and controlling in the interest of all the people of the country water-power development and the creation of hydroelectric energy" was well worth the effort and wait, and that it would "aid tremendously in the development of the water-power resources of the country . . . ." *Id.* at 6532. Congressman Dempsey favored the legislation, asserting that "[n]ot a pound of coal should be used where water power can be had to take its place, and there can and will be no considerable development of water power without the passage of such a measure as this." *Id.* Finally, Congressman Sinnot indicated his willingness to accept the legislation as a means "to release these vast water powers . . . ." *Id.* at 6537. The House agreed to the conference report on May 4, 1920. *Id.* at 6538-39.

Senate consideration of the conference report also clearly indicates that in passing H.R. 3184, Congress intended to pass a "water-power bill." Senator Lenroot opposed the conference report, but it is clear from his opposition that he considered the bill a measure governing water-power development. He stated his general opposition to "this water-power legislation" thus:

> "I realize . . . the very great necessity of the development of *our water power*, the great saving of coal and the effect on transportation which will

result from the development of our water power, and I believe that inducements necessary to secure development should be offered to private capital. The difference between the committee and some of us is simply as to what inducements are necessary to secure that development. The committee evidently believes that it is necessary to go very much further in inducements than I believe is necessary to secure that development." *Id.* at 7723 (emphasis added).

Senator Hale also spoke in opposition to the bill. He recommended the adoption of certain amendments in line with his general view:

"The purpose of this bill is not really to regulate commerce but to control water powers. As such it should not go beyond what really affects the commerce of the country." *Id.* at 7725.

Senator Hale acknowledged, however, that some legislation, such as the "present water-power act," was "undoubtedly necessary if the water-power development of the country is to be allowed to proceed." *Id.* Senator Hale was apparently concerned over the breadth of FPC jurisdiction granted in the bill:

"[U]nder the provisions of this bill the *Water Power Commission* will, unless prevented by the Congress, assume jurisdiction over practically all of the rivers of the country. Licenses will be obtained from the commission *to erect dams and water powers.*" *Id.* at 7726 (emphasis added).

Senator King also expressed his discontent with the extensive reach of the FPC under the present bill:

"Notwithstanding there is no plenary or other power in the Federal Government to exercise any control over the streams of the United States, except to prevent interference with their navigation,

> *this bill seeks the control of all sources of hydraulic power in the United States* as well as the control of all streams therein.
>
> "I believe a fair reading of the bill will furnish convincing proof that it seeks to control not only the water-power sites in the United States but also the corpus of the streams and the hydroelectric plants which produce electric energy, together with the power thereby developed." *Id.* at 7779 (emphasis added).

It is significant that those senators who opposed H.R. 3184 for its expansiveness never indicated the possibility that the FPC may, under the present bill, possess jurisdiction over non-hydro power plants. The Senate agreed to the Conference Report on May 28, 1920. *Id.*

VI. 1935 (74TH CONGRESS)

In Title II, Part 1, of the Public Utility Act of 1935, ch. 687, 49 Stat. 803, Congress amended the Federal Water Power Act of 1920. These amendments had been "requested by the Federal Power Commission on the basis of its experience in the administration of that act. Most of them are designed merely to clarify the act in its application to situations that have arisen in its administration." S. REP. No. 621, 74th Cong., 1st Sess. 17 (1935). The legislative history of two sections of the 1935 Act supports the view that the Federal Water Power Act in general, and Section 4(e) in particular, were intended to govern merely hydro-power development.

Section 210 of Title II, Part 1, of the 1935 Act amended Section 23 of the Federal Water Power Act. The second paragraph of Section 23 read:

> "That any person, association, corporation, State, or municipality intending to construct a

dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, may in their discretion file declaration of such intention with the commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws." 41 Stat. 1063, 1075.

S. 2796, the bill reported from the Senate Interstate Commerce Committee, amended this paragraph by, *inter alia,* inserting the following sentence at the beginning of the paragraph:

"It shall be unlawful for any person, State, or municipality to construct, operate, or maintain any dam, water conduit, reservoir, powerhouse, or other works across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or *for the purpose of utilizing the surplus water or water power from any Government dam,* except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act." S. 2796, 74th Cong., 1st Sess., Title II, Part 1 § 206 (1935) (emphasis added).

The Senate Commerce Committee explains the purpose and effect of the proposed amendment accordingly:

> "[A] provision is inserted expressly making it unlawful to construct a project on any navigable waters without a license granted pursuant to the act. This latter provision is in substance the effect of the River and Harbor Act of 1899 when read with the Water Power Act. It is thought desirable to bring together in a single act the positive requirements *regarding the construction of water-power projects.* Under this subsection with the two amendments here made every person intending to construct a project which might conceivably affect any navigable waters would be under the duty of coming to the Commission. The act would be greatly strengthened by enabling the Commission to preserve control over all projects with which the Federal Government has any valid concern." S. REP. No. 621, *supra* at 47 (emphasis added).

A summary of S. 2796 prepared by the Committee of Public Utility Executives summarized the amendment to the second paragraph of Section 23 by stating it provided that it was:

> "Unlawful for any person, state or municipality to *construct or operate a dam or water power facilities* upon any waters of which Congress has jurisdiction or upon public lands or reservations except under permit or existing right of way granted prior to June 10, 1920 or license granted under this Act." Summary at 48 (May, 1935) (emphasis added).

The surplus water clause in Section 210 of S. 2796, as it passed the Senate, read: "[U]tilize the surplus water or water power from any Government dam. . . ." The operative phrase "surplus water or water power" remained in the clause, and the summary of the bill

published by the Committee of Public Utility Executives again described the bill as applying to "any person, state or municipality [planning] to construct or operate a dam or water power facilities. . . ." Summary at 44 (June, 1935).

S. 2796, as reported from the House Interstate and Foreign Commerce Committee, contained a surplus water clause which read: "[F]or the purpose of utilizing the surplus water or water power from any Government dam. . . ." The House Interstate Commerce Committee report was more ambiguous than the Senate report in addressing the scope of the provision. The House report stated, in relevant part:

> "The second paragraph of section 23, . . . is . . . amended by expressly making unlawful the *construction of any dam, water conduit, reservoir, or power house* in any of the navigable waters of the United States, or upon any of the public lands or reservations in the United States, except pursuant to a permit granted prior to June 10, 1920, or a license granted pursuant to the act.
>
> "This provision is in substance the present result under the River and Harbor Act of 1899 and the Water Power Act. Furthermore, the provision making discretionary the filing of applications for preliminary permits for the construction of projects in the nonnavigable tributaries of navigable streams is changed to make such applications mandatory. In this way, every person intending to construct a project which might affect navigation would be required to come to the Commission for a determination of the interests of the United States. This would greatly strengthen the act by enabling the Commission to maintain control over all projects with which the Federal Government has any valid concern." H.R. REP. NO.

1318, 74th Cong., 1st Sess. 25-26 (1935) (emphasis added).

The summary prepared by the Committee of Public Utility Executives remained less ambiguous, however, and stated the provision dealt with "a dam or water power facilities. . . ." Summary at 42 (June 27, 1935) (preliminary draft, never published).

As reported from the Conference Committee, Section 210 of S. 2796 amended the second paragraph of Section 23 by, *inter alia,* inserting the following section to begin what is presently Section 23(b):

> "It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or *utilize the surplus water or water power from any Government dam,* except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act." H.R. REP. No. 1903, 74th Cong., 1st Sess. 46 (1935) (emphasis added).

The House conferees explained this amendment of Section 23 thus:

> "Section 23(b) as carried in section 210 of the Senate bill provided that it should be unlawful for any person 'for the purpose of developing electric power', to construct dams or other works on navigable waters or public lands or 'to utilize' surplus water or water power from any Government dam except under a license or other authority granted prior to 1920. The words quoted were

> not in the House amendment, but are incorporated in the conference substitute, with the addition that works 'incidental thereto' come within the prohibition." Statement of the Managers on the Part of the House, *id.* at 74.

The Public Utility Act of 1935 was approved August 26, 1935. The Committee of Public Utility Executives described Section 210 of the Act as pertaining merely to the construction or operation of "a dam or water power facilities. . . ." Summary at 32 (Sept. 1935).

The legislative history of Section 210 is relevant to a determination of the scope of the surplus water clause in Section 4(e) since it too contains the language "surplus water or water power." The Senate report on the bill expressly states that this section pertains merely to the "construction of water-power projects." This view is reinforced by a private organization's consistent interpretation of Section 210 as concerned with the construction and operation of "a dam or water power facilities." This view is neither contradicted nor expressly supported by the subsequent House report and conference report on the bill.

The second amendment enacted in 1935 which is relevant to the determination of the scope of the Federal Water Power Act of 1920 is the amendment of Section 10(e) provided for in Section 206 of Title II, Part 1, of the Public Utility Act. Section 10(e) of the Federal Water Power Act applies broadly to the "reasonable annual charges" paid by the "licensee." 49 Stat. 803, 843. The Senate report on S. 2796, in describing the proposed amendment to Section 10(e), states:

> "Several minor changes are made in section 10(e), relating to the charges to be paid by

> licensees. The charge to be fixed by the Commission for the purpose of reimbursing the United States for the cost of administration is limited to the cost of administering this part of the act, instead of the entire act. This makes no change in the present situation, but *confines the charges to those needed for the administration of the water-power provisions.*" S. REP. No. 621, *supra* at 45 (emphasis added).

The House Report on S. 2796 does not explicitly describe Part 1 of the Federal Power Act as "the water-power provisions," but does apparently conceive of a licensee as operating a "project."

> "There are several minor changes in section 10(e) relating to the charges to be paid by licensees. The amount to be fixed for the purpose of reimbursing the United States for the cost of administration is limited to the present amount by the provision that the base is the cost of administering this part of the act, not the entire act, which would include the new parts II and III. The Commission's authority to adjust all charges from time to time is made express. It is also made clear that the adjustment of charges for licenses involving the use of Government lands shall be made 'by the Commission'; the time of such adjustment is calculated from the time the *project* is available for service, instead of from the beginning of operation; . . ." H. R. REP. No. 1318, *supra* at 24 (emphasis added).

The conference report on S. 2796 merely refers to the tribal lands amendment. H. R. REP. No. 1903, *supra* at 73. Thus, the Senate report on S. 2796 provides further support for the view that Part 1 of the Federal Power Act regulates merely hydro-power development. The House report and the conference report on the bill do not contradict this notion.

ITEM 2

FINDINGS OF FACT, JICARILLA APACHE TRIBE v. MORTON, ET AL., 3 ERC 1919 (1972), AFF'D, 471 F.2d 1275 (9TH CIR. 1973)

Findings of Fact

From a review of the pleadings, memoranda, affidavits, exhibits and all matters filed herein which it appears to the Court the parties stipulated and intended that the Court take into consideration in determining this case, the Court adopts as its Findings of Fact those proposed or submitted by the intervenors; therefore,

It Is Ordered that the Findings of Fact proposed by the intervenors herein and heretofore submitted to the Court are hereby adopted as the Findings of Fact of this Court the same as if fully set forth herein.

* * * * *

Findings of Fact

Four Corners Project

1. The Four Corners Power Plant is located on the Navajo Indian Reservation near Farmington, New Mexico. The Plant consists of five coal-fired steam electric generating units. Units No. 1 and No. 2 were placed in commercial operation in 1963. Unit No. 3 was placed in commercial operation in 1964. These three units are owned and operated by Arizona Public Service Company. Units No. 4 and No. 5 are owned as tenants in common by Arizona Public Service Company (15%), El Paso Electric Company (7%), Public Service Company of New Mexico (13%), Salt River Project Agricultural Improvement and Power District (10%), Southern California Edison Company

(48%), and Tucson Gas and Electric Company (7%). Arizona Public Service Company operates Units No. 4 and No. 5 as Operating Agent for the owners of these units. Unit No. 4 was placed in commercial operation in July, 1969. Unit No. 5 was placed in commercial operation in July, 1970.

2. The Four Corners Plant was originally established in 1960, when Arizona Public Service Company obtained a site lease for a power plant from the Navajo Tribe. The instruments relating to this lease were:

(a) Indenture of Lease between the Navajo Tribe of Indians and Arizona Public Service Company, signed by the parties on December 1, 1960, and approved by the Secretary of the Interior on December 14, 1960.

(b) Wholesale Power Supply Agreement between Arizona Public Service Company and the Navajo Tribe of Indians, signed December 1, 1960 and approved by the Secretary of the Interior on December 14, 1960.

3. On July 6, 1966, by provisions of the "Arizona § 323 Grant" from the Secretary of the Interior and by provisions of the Supplemental and Additional Indenture of Lease, rights-of-way and easements were granted to Arizona Public Service Company for use in connection with Units 1, 2 and 3.

4. Units No. 4 and No. 5 were added to the Four Corners Generating Station pursuant to the following instruments:

(a) "§ 323 Grant", granting multiparty rights-of-way and easements, for the enlarged station, by the Secretary of the Interior was signed on July 6, 1966.

(b) Supplemental and Additional Indenture of Lease (which also supplemented and modified the 1960 Lease to Arizona Public Service Company) between the Navajo Tribe of Indians and all owners, signed by the parties May 27, 1966 and approved by the Secretary of the Interior, July 6, 1966.

5. Coal for each of the five units is supplied by Utah Construction and Mining Company from lands under lease from the Navajo Tribe since 1957. Water for use of Units 1-5 (about 51,600 acre-feet annually) is obtained from the San Juan River under diversion rights granted by the New Mexico State Engineer in 1955. A water service contract approved by Congress was executed by the Secretary of the Interior in April 1968 with Utah Mining and Construction Company for 44,000 acre-feet of water from the Navajo Reservoir, a Bureau of Reclamation facility, for possible future development of coal resources.

6. Based on environmental provisions included in the 1966 lease, the lessees are required to install the best pollution control equipment then available in all five units and to periodically update such equipment. The plants are required to operate in compliance with criteria specified in the lease. The technology of pollution control equipment is subject to periodic review by the Secretary of the Interior to determine if updating is necessary. Arbitration is provided if differences of opinion should arise concerning the implementation of these provisions.

7. On October 22, 1970, federal approval was given for the design of scrubbers to be installed on Units 1, 2 and 3. The only pending request for approval now before the Department of the Interior for the Four

Corners Plant concerns the design of air pollution control equipment to be added to Units 4 and 5 which will materially reduce particulate emissions.

8. With respect to Units 6, 7 and 8 at the Four Corners site, no federal action has been taken since January 1, 1970, and no federal actions are pending. At this time, these units are a potential future site for one or more fossil-fueled generating units similar to a large number of other potential sites scattered throughout the Southwest.

9. As of January 1, 1970, it was not practicable to reassess the basic course of action with respect to the Four Corners Project.

10. Federal action on the Four Corners Project since January 1, 1970, has been shaped to minimize adverse environmental consequences.

11. An environmental impact statement has not been prepared with respect to federal action on the Four Corners Project.

MOHAVE PROJECT

12. The Mohave Project consists of two 755,000 kw coal-fired steam electric generating units located in Clark County, Nevada. The related Eldorado Transmission System includes 57 miles of jointly owned 500 kv transmission line connecting the Mohave Project with the jointly owned Eldorado substation near Boulder, Nevada. The Eldorado Transmission System consists of three major components:

(a) The Mohave-Eldorado 500 kv Transmission Line;

(b) The No. 1 and No. 2 Eldorado-Mead 200 kv Transmission Lines;

(c) The Eldorado Substation Site.

13. The participants in this project are: Southern California Edison Company ("Edison") (56%), Salt River Project Agricultural Improvement and Power District (10%), Nevada Power Company (14%), and the Department of Water and Power, City of Los Angeles (20%). The major components of the Eldorado Transmission System are owned by some or all of the participants in various different percentages.

14. The plant is constructed on non-Federal, non-Indian lands. Coal is supplied to the plant from the Black Mesa in Arizona by a 275-mile underground slurry line. The coal is mined from Indian lands under leases dated February 1, 1964, and June, 1966, between Sentry Royalty Company and the Navajo Tribe for approximately 24,858 acres and 40,000 acres, respectively. A June, 1966 lease between Sentry Royalty Company and the Hopi Tribe covers the same 40,000 acres as are covered in the latter lease with the Navajo Tribe. Sentry Royalty Company's rights have been assigned to Peabody Coal Company, with the approval of the Navajo and Hopi Tribes.

15. Preliminary studies relating to the selection of the site for the Mohave Project were under way as early as 1962 in which the economics, water availability, fuel availability pertaining to various sites were explored. A decision was made in 1965 to construct the Mohave Project at its present site on a joint ownership basis.

16. On October 26, 1966, the United States conveyed fee title to certain lands, including the plant site, to the Colorado River Commission of Nevada (the "Commission") which, on the same date, conveyed title to Edison of the Mohave Plant Site.

17. On October 26, 1966, the United States entered into a Contract for Delivery of Water with the Commission to deliver to the Commission not more than 30,000 acre feet of the State of Nevada's annual allocation of 300,000 acre feet allotted under the Boulder Canyon Project Act by contract dated March 30, 1942, as supplemented January 3, 1944, between the United States, the State of Nevada, and its Commission. In turn, on the same date, the Commission entered into a Water User Contract with Edison pursuant to which the Commission agreed to deliver to Edison not to exceed 30,000 acre feet of water for use in connection with the Mohave Project. The Water User Contract obligates Edison to perform the obligations of the Commission under its contract with the United States. The rate of diversion of water delivered was limited to not in excess of 50 cubic feet per second. The contract contains further provisions requiring Edison to prevent any significant and measurable pollution of the waters of the Colorado River, intermittent tributary streams of underground waters and/or any measurable return of waste water thereto by reason of development, operation return or activities on the plant site unless otherwise agreed by the Commission and the Secretary of the Interior. All designs and plans for waste water, waste material and sewage disposal facilities were required to be submitted to the Secretary for his written approval in advance of construction or installation and in advance of any modification or removal thereof. The agreement further provides that nothing in the contract would be construed to relieve Edison from complying with all valid applicable water pollution control regulations under Federal, State or County jurisdiction then or thereafter in force.

18. The Water User Contract required the prior written approval by the Secretary of the Interior of construction, installation, removal or major modification of air pollution control equipment employing the most effective, commercially proven, electrostatic concept available under the technology known at the time of design of said facilities, and Edison was required to operate such equipment so as to remove not less than 97% of the particulate matter in the stack emissions in each month and not less than 96% thereof in any 24-hour period, subject to deviations arising from uncontrollable forces. The contract also specified the height of the plant stack to be not less than 500 feet above ground grade and requires a review not less often than every 10 years of technological advances in air pollution control equipment to determine the feasibility of installing additional equipment or modifying existing equipment, taking into account the costs as well as the benefits of improved air pollution control. The contract called for the monitoring of the operation and efficiency of the air pollution control equipment and the furnishing of monthly reports showing the average month assay of the ash and sulphur content of the coal employed. The contract also provides that nothing therein would be construed as to relieve Edison from complying with all valid applicable air pollution control laws and regulations under Federal, State or County jurisdiction then or thereafter in force.

19. The Water User Contract obligated Edison, unless the Secretary of the Interior otherwise approved, to use coal mined from the Black Mesa area located on Indian Reservation land in Arizona as the fuel supply for the plant, with exceptions permitting the use of natural gas for ignition purposes at all times, and

natural gas or other coal in the event of emergencies or unavailability of such coal.

20. On December 12, 1966, the Mohave Project Preliminary Agreement between Nevada Power Company, Salt River Project, and Edison was entered into to establish in a preliminary way the responsibility for construction and operation of the Mohave Project, the participation shares of each of the parties, an outline of the definitive agreements required to be negotiated and executed, and a reservation of the right of Edison to make available a 20% interest in the project to The Los Angeles Department of Water & Power. The Plant Site Conveyance and Co-Tenancy Agreement dated May 29, 1967, between Nevada Power Company, Salt River Project and Edison, and the Plant Site Conveyance and Co-Tenancy Agreement Assignment between Edison and The Los Angeles Department of Water & Power dated December 23, 1968, definitively established the ownership shares of the participants in the project and additional contracts among the participants were negotiated and signed at various dates from June, 1967, through December, 1968, when the participation of The Los Angeles Department of Water & Power was finalized.

21. On January 6, 1967, Edison and a predecessor in interest of Peabody Coal Company entered into the Mohave Project Coal Supply Agreement calling for the delivery by means of a 275-mile 16 inch coal slurry pipeline from lands held under mining leases dated February 1, 1964, from the Navajo Indian Tribe and from the Hopi and Navajo Indian Tribes, the latter lease covering the two tribes' undivided interests in lands within a Reservation created by the 1882 Executive Order of the President of the United States. The

Mohave Project Coal Supply Agreement provides for the delivery of a minimum of 117 million tons of coal to the Mohave Project plant site over a 35-year period. Plans for the pipeline crossing of the Colorado River were approved by the Department of Interior, January 11, 1967.

22. On May 29, 1967, undivided interests in the plant site, the Water User Contract and the Coal Supply Agreement were assigned by Edison to Nevada Power Company and Salt River Project, and on December 23, 1968, an undivided interest in land and in the Water User Contract and Coal Supply Agreement were assigned to The Los Angeles Department of Water & Power.

23. Construction of both units commenced June 1, 1967, and on January 1, 1970, Unit 1 was 70% complete, Unit 2 was 40% complete, with overall construction 55% complete. To that date total expenditures aggregated approximately $110 million. Contractual commitments for approximately $200 million of the estimated final cost now estimated at $234 million had been made.

24. Pursuant to the provisions of the Water User Contract, the following federal approvals were granted: plans and designs for air pollution control (1968); designs and specifications for the ash disposal facility (October, 1970); plans and specifications for additional sewerage facilities for a maintenance building (January, 1971); plans for draining excess waste water from evaporation pond (March and April, 1971); and plans and specifications for construction of a second industrial waste water evaporation pond (April, 1971).

25. By June 1, 1971, construction of Unit 1 had been completed and was in commercial operation. At that

date, construction of Unit 2 was 90% complete, with overall construction of the project 95% complete. An aggregate of approximately $200,700,000 had been expended. Unit 2 is now in commercial operation.

26. Applications on behalf of Nevada Power Company, Salt River Project and Edison for transmission rights-of-way were filed October 11, 1968, with the Bureau of Land Management and were granted by Decision issued December 5, 1968. Applications on behalf of all four participants were filed February 27, and April 22, 1969, for rights-of-way and easements covering respectively the Eldorado Substation and the Mohave-Eldorado 500 kv transmission line. The applicable rights-of-way and easements for the Eldorado Substation were acquired by Decision dated August 7, 1969, and for the transmission line by Decision dated December 30, 1969, which was corrected on January 8, 1970, to include The Los Angeles Department of Water & Power in conformity with the original application. Construction of the Eldorado Transmission System commenced December 1, 1968, and it was placed in operation December 16, 1969, at a cost of approximately $20 million.

27. There are no pending approval actions in the Department of the Interior for the Mohave plant except design of a proposed increase in the capacity of the waste water pond.

28. As of January 1, 1970, it was not practicable to reassess the basic course of action with respect to the Mohave Project.

29. Federal actions on the Mohave Project since January 1, 1970, have been shaped to minimize adverse environmental consequences.

30. An environmental impact statement has not been prepared with respect to federal actions on the Mohave Project.

NAVAJO PROJECT

31. The Navajo Project consists of the following components:

(a) Three coal-fired electric generating units having a nameplate rating of 750 megawatts each, located approximately five miles east of Page, Arizona.

(b) A 79-mile coal haul railroad which will transport coal from Peabody Coal Company's Black Mesa Mine located on the Navajo and Hopi Indian Reservations to the plant site for the Navajo Generating Station.

(c) A 500 kv electric transmission line to transmit power and energy from the Navajo Generating Station to the McCullough Substation located in Southern Nevada.

(d) Two 500 kv electric transmission lines to transmit power and energy from the Navajo Generating Station to the Westwing Substation located in Northwest Metropolitan Phoenix.

32. The participants in the Navajo Project are Arizona Public Service Company (14%), Salt River Project Agricultural Improvement and Power District (21.7%), United States of America (24.3%), Tucson Gas & Electric Company (7.5%), Nevada Power Company (11.3%), Department of Water and Power, City of Los Angeles (21.2%). The United States was authorized to participate in the plant to supply power for the Central Arizona Project by P.L. 90-537, 82 Stat. 885, Act of September 30, 1968.

33. The decision to locate the Navajo Generating Station near Page, Arizona, was reached after an intensive study of the need for power in the future, the locations of a fuel source and cooling water, proximity to transmission facilities and load centers for the participants, and social and environmental factors. In June of 1968, Secretary of the Interior Stewart Udall met with representatives of various organizations which had expressed an interest in additional electric generating capacity in the Southwest. As a result of the meeting, a joint study committee was formed and designated as the Navajo-Four Corners Steering Committee. The Steering Committee undertook as its task the investigation of the feasibility of developing major coal-fired thermal electric generating stations at Page, Arizona, Four Corners, New Mexico, and any other suitable alternate location.

34. After an intensive investigation by eight separate task forces, the following conclusions were reached:

(a) Based upon the load growth in the area, expressions of interest of potential participants and economic transmission system development, there was need for three 770 megawatt units in the years 1974, 1975 and 1976.

(b) The most economical alternative to supply these requirements would be the installation of three 770 megawatt units at a site located near Page, Arizona, which would be fueled by coal from Black Mesa coal deposits on lands leased by Peabody Coal Company from the Navajo and Hopi Indian Tribes. It was further concluded that the most economical means of transporting the coal from the Black Mesa Mine to the plant site would be by train.

(c) The capacity generated by the three 770 megawatt units could be economically transmitted to the load centers of the utilities expressing an interest in participating in the Navajo Project over three 500 kv lines. One 500 kv line would go from the Navajo Generating Station west to the McCullough Substation, located in the southern tip of the State of Nevada near Boulder City. Two 500 kv lines would go from the Navajo Generating Station plant site south to a point in northwest Phoenix. Each of the participants in the Navajo Project would then require additional transmission facilities so as to transmit their entitlement from the Navajo Generating Station from the terminus of the 500 kv system into their respective systems.

(d) The Navajo Project offered the most economical source of pumping capacity for the Central Arizona Project.

35. On September 30, 1969, the Secretary of the Interior filed with Congress the report required by the Colorado River Basin Project Act advising Congress of his findings that participation in the Navajo Project represented the most suitable alternative for supplying the power requirements of the Central Arizona Project. Shortly thereafter, and prior to December 31, 1969, the participants entered into the Navajo Project Participation Agreement dated as of September 30, 1969, obligating them to proceed with the Project.

36. The participants in the Navajo Project were committed to proceed with this project as of September 30, 1969, and the fact that the National Environmental Policy Act of 1969 was to become effective on January 1, 1970, did not influence in any way the date on which the participants in the Navajo Project committed themselves to proceed with the Project.

37. The generating station is located on Navajo tribal lands. The Navajo Tribal Council entered into an agreement for lease of these lands in September, 1969. The lease was approved by the Department of the Interior in December, 1969. A water service contract (14-06-400-5033) for up to 34,100 acre-feet of consumptive use annually was executed by the Department of the Interior January 17, 1969. A grant of various rights-of-way, easements, and access roads was approved by the Department of the Interior in December, 1969.

38. Under the water service contract and other project agreements, the owners are required to install the most effective commercially proven electrostatic or equally effective air pollution control equipment then available, periodically update such equipment, and operate the plant in compliance with operational criteria specified therein. The contract does not relieve the contractor from compliance with applicable, Federal, State and local air and water pollution control standards. Disagreement as to the implementation of these provisions is subject to arbitration.

39. The coal for the Navajo Project is to come from Black Mesa, Arizona. Part of the coal lease is on Navajo tribal lands and part is on a joint use area of the Navajo and Hopi Tribes. The Navajo Tribe entered into two coal mining leases (14-20-0603-8580 and 14-20-0603-9910) in 1964 and 1966, respectively. The Hopi Tribe entered into a coal mining lease (14-20-0450-5743) in June, 1966. The coal is to be hauled by rail 78 miles to the plant site. An application by the plant participants for rights-of-way and easements from the Navajo Tribe for the coal-haul railroad was approved in January, 1971.

40. Prior to January 1, 1970, the participants in the Navajo Project had expended funds and entered into contracts for the purchase of equipment and services for the Navajo Project. The amount involved in these expenditures and contracts totaled $107,437,000 as of January 1, 1970. Actual physical construction of the Navajo Generating Station commenced in April of 1970, and actual physical construction of the Coal Haul Railroad commenced in February of 1971.

41. Pursuant to the terms and conditions of the Water Service Contract of January 17, 1969, and the Indenture of Lease with the Navajo Tribe, the Department of the Interior must review and approve the plans for the following major systems relating to air and water quality control:

(a) Chimney
(b) Lake Pumping Station
(c) Ash Handling Equipment
(d) Ash Disposal Area
(e) Sanitary Sewage
(f) Process Waste Disposal
(g) Particulate Removal Equipment
(h) SO_2 Removal Equipment
(i) Coal Handling Facilities
(j) Waste Water Drainage and Discharge
(k) Coal Pile Stabilization
(l) Pollution Monitoring Instrumentation

42. The non-federal participants in the Navajo Project must receive the power to which they are entitled from the Navajo Project by the projected completion dates for the three units of that Project, June, 1974, 1975 and 1976 respectively, in order to supply the anticipated requirements of their customers. It is nec-

essary that the construction schedules be essentially met in order to have the generating units in commercial operation as required. Unavailability of power from the Navajo Project according to schedule would place in serious jeopardy the ability of the participants to serve their customers.

43. Following a determination by the Secretary of the Interior that such actions were necessary to permit the project to proceed in accordance with the established construction schedules and that these particular approvals could not be delayed to permit preparation and filing of a final environmental impact statement, the Department of the Interior approved the license agreement for the pipeline and holding reservoir for water and coal haul railroad construction in April, 1970, a water service agreement for plant construction in 1970, an easement for water intake pipeline in October, 1970, a section 323 Grant covering the railroad right-of-way in January, 1971, plans and specifications for the waste water treatment plant in March, 1971, a water service contract for construction of the coal haul railroad in April, 1971, and the chimney height in May, 1971.

44. In 1969, Bechtel Corporation, Morrison-Knudsen Company, Inc. and Dames & Moore were employed by Salt River Project, the Project Manager, to make independent studies concerning the environmental aspects of the Navajo Generating Station and coal haul railroad. In no case has the Salt River Project or any of its officers, agents or employees dictated to these companies the conclusions that they were to reach in these studies and the studies have in fact been independent.

45. Subsequent to January 1, 1970, each of the environmental systems related to the Navajo Generating Station has been re-evaluated and substantial modifications made in the environment systems as a result of this reevaluation. Prior to January 1, 1970, it was estimated that the environmental systems relating to the Navajo Generating Station would cost $28,010,000 and, as of November 1, 1971, it is estimated that the environmental systems will cost $138,360,000.

46. On January 1, 1970, it was not practicable to reassess the basic course of action established by the participants in obligating themselves to proceed with the Navajo Project. However, alternates to each of the environmental systems have been reviewed and substantial alternations made in these systems in order to minimize their adverse environmental impact. The following major environmental systems have been reassessed since January 1, 1970:

(a) The original design for the Lake Pumping Station called for extending pipes over the cliffs of Lake Powell. These pipes would have been visible from the Lake. Since January 1, 1970 the design of the water in-take facilities was modified and present plans call for slant drilling so as to avoid any defacement of the Lake Powell cliffs and to recess the Lake Pumping Station so that it will not be visible from any point on Lake Powell.

(b) The original plans for the Navajo Generating Station called for returning up to 5,900 acre feet of cooling tower blowdown to Lake Powell. The return of water was permitted under the terms and conditions of the Water Service Contract entered into between the Salt River Project and the United States Bureau of Reclamation. After extensive hydrologic and environmental studies, it was concluded subsequent to January

1, 1970 not to return any water to Lake Powell notwithstanding the fact that the return of the cooling tower blowdown would have no appreciable environmental effect. This decision was made following consultations with representatives from state agencies in the States of Colorado, New Mexico, Utah, Arizona, Nevada and California, and with representatives from several federal agencies, including the Environmental Protection Agency, National Park Service and the Bureau of Sport Fisheries and Wildlife.

(c) The original plans for the Navajo Generating Station called for cold precipitators for fly ash collection. Subsequent to January 1, 1970 a decision was made to install hot electrostatic precipitators because their collection efficiency is not affected by the sulfur content in the coal and it is anticipated that they will provide a higher degree of collection efficiency and be more reliable.

(d) The original plans for the Navajo Generating Station did not call for SO_2 removal systems. Subsequent to January 1, 1970 a decision was made to install SO_2 removal systems on all three units. This decision was made after extensive meteorological studies and after consultation with representatives from the Tennessee Valley Authority, United States Bureau of Reclamation, Environmental Protection Agency and the Arizona State Health Department.

(e) The original plans for the Navajo Generating Station did not contain any provision providing for flexibility in boiler combustion. Subsequent to January 1, 1970 a decision was made to modify the boilers to permit greater flexibility in combustion so as to provide an opportunity for reducing the formation of nitrogen oxides in the combustion process.

(f) The original plans for the Navajo Generating Station did contain provisions for dust abate-

ment. Since January 1, 1970 additional dust abatement facilities have been planned for installation at the Navajo Generating Station.

(g) Modifications have been made in the design of the Navajo Generating Station since January 1, 1970 to improve the appearance of the Generating Station. These include housing the turbine generators, using high intensity lights on the stacks rather than painting them red and white, and improved color treatment to better blend in with the surrounding area. All of these modifications have resulted in substantial increased costs. In addition, since January 1, 1970 a reassessment has been made of the environmental systems, both major and minor, and numerous improvements made in the minor environmental systems.

47. The participants in the Four Corners, San Juan, Mohave, Navajo and Huntington Canyon Plants requested that the meteorological consultants for these projects jointly assess the cumulative impact of these plants on air quality in the Colorado River Basin. The conclusions of that study were as follows:

(a) Based on the considerations of local winds, terrain effects and professional judgment, the Colorado Plateau region can be divided into specific "air sheds." The Four Corners and San Juan Plants are in the same air shed. Each of the other plants is in a separate air shed.

(b) Evidence indicates little significant meteorological interaction between these air sheds during stagnant conditions.

(c) Because each major effluent source is located within a different air shed, contaminants from each major source will not interact under stagnant conditions. (The Four Corners and San Juan power plants were considered as a single source for the purposes of this study.)

(d) During a postulated 23-day stagnation period (January 4-27, 1968), the area was ventilated three times. Even if extended periods of stagnation were to take place, the natural pollutant removal processes of the atmosphere would limit the buildup of contaminants.

(e) Meteorological studies indicate that stagnation may last as long as thirteen days in this area. However, each separate air shed should be evaluated further since the degree of stagnation, and its consequences, will vary among the different locales.

48. In 1971, the Hydraulics and Hydrology Group of Bechtel, Incorporated, researched and computed the effects of the San Juan, Four Corners, Navajo, Kaiparowits and Mohave thermal electric power plans on the water quality of the Colorado River.

The conclusions of this investigation were as follows:

(a) The net withdrawal of salts from the River by the five plants will be about 166,000 tons per year, under the assumption of a withdrawal of 208,000 acre feet per year.

(b) The withdrawal of water is in accordance with the Water Service Contracts executed between the United States and the respective utilities, the apportionment of water to the States of Utah, New Mexico and Arizona, and the Law of the River.

(c) As the usage of water in the Upper Basin is increased to develop fully the allocations to the respective states, it may be expected that the water presently released downstream in excess of contract requirements will be reduced. Consequently, there will be less surplus water available to dilute downstream return flows and other sources of salt concentration.

(d) Under present modified conditions the effect of the five power plants on salt concentrations at

Lee Ferry will be zero; below Hoover Dam, salinity will increase by 0.4 percent or 3 ppm. At Imperial Dam the projected increase will be about 7 ppm under the 1941-1966 present modified conditions or 10 ppm under projected future inflow conditions; against background salinities of 832 ppm and 869 ppm, respectively, these increments amount to 0.8 and 1.2 percent. It will be nearly if not entirely impossible to detect these increments with standard methods of chemical water quality analysis and instrumentation as used by the U.S. Geological Survey. Since the incremental salinity cannot be subjected to measurement, it seems clear that effects, economic or otherwise, will also be unmeasurable.

(e) Releases to Mexico will continue to be made in full accord with Treaty requirements. In addition, drainage wells and bypass drains have been constructed and reservoir operating procedures have been adopted to minimize salinity in the water crossing the International Boundaries. The effect of the diversions to the five power plants on the quality of water delivered to Mexico will, at worst, cause no more than about 1 percent increase in concentration, and may, in fact, cause a decrease in concentration.

(f) The only planned return of water to the River from the withdrawal will be from a "blowdown" from the Four Corners cooling pond. There will be no return of water or salt to the River from the other four plants.

(g) The salt removed from the blowdown water will be largely disposed of in impermeable ponds to prevent return seepage and upon completion of the plant operation the ponds will be buried to prevent blowing of dry salts over the area.

(h) The addition of the five large thermal electric power plants to the economic and indus-

trial structure of the Colorado River Basin is in full accord with the planned development of the water resources of the Basin. The plants will not create significant unforeseen problems of water availability or water quality.

49. The Secretary of the Interior has determined that, with the exception of the Four Corners and San Juan Plants, the cumulative environmental effect of the following described plants:

Plant	Unit No.	Size (MW)	Date of Oper.
Four Corners	1	175	'63
Four Corners	2	175	'63
Four Corners	3	225	'64
Four Corners	4	775	'69
Four Corners	5	775	'70
Mohave	1	755	'71
Mohave	2	755	'71
San Juan	1	330	'73
San Juan	2	330	'77
Navajo	1	750	'74
Navajo	2	750	'75
Navajo	3	750	'76
Huntington	1	430	'73
Huntington	2	430	'78

is not significant and that each of the above described plants can be treated as separate entities from an environmental standpoint and from the standpoint of the application of the Environmental Policy Act.

50. The Secretary of the Interior has made the following substantive decisions pertaining to the Navajo Project:

(a) The basic course of action calling for the timely completion of the Navajo Project was not subject to reassessment as of January 1, 1970.

(b) Certain incremental federal actions, as described in Section 11 of the Guidelines, had to be taken prior to the filing of the Final Environmental Statement.

(c) As of February 4, 1972, the Secretary had adequate information on the basis of which to prepare and file a Final Environmental Statement pertinent to the Navajo Project.

(d) As of February 4, 1972, the Department of the Interior had in all respects complied with the procedural requirements of the National Environmental Policy Act as they apply to the Navajo Project.

51. A draft environmental statement pertaining to all aspects of the Navajo Project was filed with the Council on Environmental Quality on October 5, 1971, following earlier filings made some four months prior thereto on individual aspects of the Navajo Project. Copies of the draft environmental statements were circulated to interested parties, as set forth more fully in the statement itself. The Final Navajo Environmental Statement was filed with the Council on Environmental Quality on February 4, 1972.

52. The Final Navajo Environmental Statement adequately performs the responsibility prescribed by the National Environmental Policy Act, including the analysis of the five factors required to be analyzed by that statute, assessing and evaluating alternates, and

sets forth relevant data to be considered by governmental decision-making authorities in taking major federal action having a significant effect on the environment.

53. The Department of the Interior made an independent assessment of the environmental and economic consequences of the Navajo Project and utilized and relied upon expert information from the Tennessee Valley Authority, the National Oceanic and Atmospheric Administration, and the Environmental Protection Agency, and independent studies made by consultants employed by the participants in the Navajo Project.

54. There are now pending before the Secretary of the Interior—and have been pending in excess of six months while the preparation of Section 102 statements has proceeded—applications for federal approvals necessary for the Navajo Project. Delay in making these approvals beyond about the middle of March would result in very substantial construction delays, which in turn would result in seriously jeopardizing the Navajo participants to complete the Navajo Project according to schedule and supply the power needs to their customers.

HUNTINGTON CANYON PROJECT

55. Utah Power & Light Company, Salt Lake City, Utah, is constructing an electrical generating station in Huntington Canyon, Utah, approximately 29 miles by road southwest of Price, Utah. The plant will utilize coal from an underground mine approximately 2½ miles from the station to be operated by Peabody Coal Company. A 430 mw unit is planned to be on the

line in 1974. The plant is located 235 miles northwest of the Four Corners Plant and 170 miles north of the Navajo Station site. Its site is primarily on state and privately owned lands, although the company was issued a Bureau of Land Management five-year temporary use permit on March 11, 1971, for approximately forty acres.

56. Planning for the project commenced in 1966 when the Power Company's ten-year load forecast showed that additional generating capacity would be required by the year 1974. Lead time from planning to operation of a new steam plant requires seven to eight years. A detailed study of nine sites located in Utah, Wyoming, and Idaho was made in 1967 and 1968. The study took into account basically seven factors, namely:

(a) Availability of fuel.

(b) Availability of water.

(c) Cost of plant and supporting facilities, including land, road and railroad access to site.

(d) Proximity of plant site to major load centers to minimize electrical transmission distances.

(e) Environmental impact of the plant and its associated facilities.

(f) Availability of labor to support the plant complex during both the construction and operating stages.

(g) Acceptance of the plant complex by the local community.

This study resulted in the choice of Huntington Canyon area as the optimum site for the generating plant.

57. The availability of coal and water were first investigated in 1967, and this investigation continued through the remainder of 1968. A letter of intent covering coal purchases was executed in September, 1969. Efforts were then pressed for preparation of plans for the plant, for the reservoir and for the transmission line.

58. Discussions for purchase of water stock from private companies were completed and a contract was signed in December, 1969. Acquisition of options for purchase of water from individual stockholders began in 1969. Application for a reservoir was filed in 1968 and site investigation and engineering were commenced in the fall of 1969. Negotiations were also started with interested governmental agencies for relocation of the Huntington Canyon highway.

59. Bids were invited for the turbo-generator and boiler, and a letter of intent to purchase the turbo-generator was issued August 17, 1969. Selection of an engineering firm was started in 1969. A weather study was commenced the same year.

60. The engineering contract was awarded to Stearns-Rogers on March 17, 1970, and the letter of intent to purchase the boiler was submitted. Design and engineering of the plant site, clearing, grubbing, and preparation of specifications for the procurement of major equipment were started. Weather studies were continued.

61. Planning for the construction of the transmission line also commenced in 1966 when the company's ten-year load forecast revealed that the company would not be able to meet its load requirements by 1974 without additional generation and transmission ca-

pacity. The first physical efforts to select a route from Camp Williams to the Huntington area were made by airplane in the winter of 1968. Early in 1969, negotiations with the United States Forest Service and the Bureau of Land Management commenced, looking toward the acquisition of approval for the line. Authorization to begin work on surveying and mapping was given to Engineering Enterprises on May 9, 1969, and a formal contract awarded July 26, 1969.

62. In November, 1969, BLM consulted Utah Power to ascertain the alignment of the proposed line in relation to public lands so that the impacts of the proposed project on the environment could be carefully evaluated.

63. A field review of the entire route of the proposed line in Utah was made by representatives of the Asst. Secretary for Water and Power, Bureau of Land Management, Bureau of Reclamation, Bureau of Indian Affairs, U.S. Forest Service, Utah Power & Light Company, the press (including the Salt Lake Tribune, Deseret News) and T.V. (including KSL-TV in Salt Lake City). Wide publicity was given by press and T.V. to the concern for the environment under the government's new environmental standards, and the opportunity for public comment on the proposal.

64. Based on detailed on-site examinations of the proposed route, BLM required several changes to preserve natural beauty, esthetic, historic, archeological, and other public values on BLM administered public lands. These changes were made prior to the filing of the formal application by Utah Power & Light Company on January 8, 1970.

65. No objections to the construction of the line were received by BLM and after careful consideration of the environmental aspects of the proposed project, together with Power Marketing Recommendations signed February 5, 1970, by the Assistant Secretary for Water and Power Development, the right-of-way was approved. The survey was 65% complete by January 1, 1970; design engineering was being completed; material requisitions were prepared, construction contracts had been prepared and bids received; right-of-way was being purchased and the bulk of material orders had been placed. The company received approval for a right-of-way over public lands from the Bureau of Land Management in February, 1970. The line was put into service on June 26, 1971. The total cost of the line and appurtenant facilities was approximately $26,800,000.

66. Delay of the construction of the company's first unit at Huntington Canyon, now scheduled for service in June, 1974, would render it impossible for the company to satisfy its load demands projected for 1974. The capability of this unit amounts to approximately one-third of the Utah system capability at that time. This generation cannot be replaced with a practical alternative in the less than three years remaining. A loss of generating capability of this relative magnitude would seriously jeopardize the reliability of service to customers.

67. The major impact from a moratorium on the first unit at Huntington Canyon to the Utah Power and Light Company would be:

(a) System reserve capability would change from a maximum of +15% to a—8% in 1974, and

sufficient capability would not remain to supply all the firm load. The resulting reliability and continuity of the service would be unacceptable to customers and would result in wide-spread damage.

(b) Considerable monetary loss would be suffered by the company, resulting from funds already expended and committed on the Huntington Canyon Project. It is estimated that one year's delay would result in an increased construction cost of approximately $6,000,000.

(c) Maintenance required on existing units would be curtailed since contemplated reserves would be wiped out. The already unacceptable reliability resulting from loss of the Huntington unit would further deteriorate.

68. As of January 1, 1970, it was not practicable to reassess the basic course of action with respect to the Huntington Canyon Project.

69. Federal action on the Huntington Canyon Project since January 1, 1970, has been shaped to minimize adverse environmental consequences.

70. A draft environmental impact statement prepared by the Bureau of Reclamation (Huntington Canyon Generating Station and Transmission Line, March, 1971) was sent to the Council on Environmental Quality and circulated for review and comment in April, 1971. A final statement has not yet been filed.

SAN JUAN PROJECT

71. The participants in this project are Tucson Gas & Electric Company ("Tucson") and Public Service Company of New Mexico ("New Mexico"). Two units are presently planned with a capacity of about

330 megawatts each. One unit is under construction with scheduled operation in 1973. No planned dates have been announced for operation of the other unit. The plant is to be constructed on non-Federal, non-Indian lands.

72. The growing demand for electricity and the need for additional generating facilities, together with the availability of low sulphur coal and water in the area, necessitated the decision to construct the San Juan coal-fired steam generating plant near Farmington, New Mexico.

73. On November 1, 1961, New Mexico acquired two (2) coal leases from the Bureau of Land Management covering 4,912 acres in San Juan County, New Mexico. On August 13, 1963, rights under a Bureau of Land Management coal lease, contiguous to the other lease, covering 1,800 acres in San Juan County, New Mexico, were acquired.

74. On March 22, 1968, Senate Joint Resolution 123, being Public Law 90-272, authorized a "water contract" between the United States and New Mexico which allowed the United States to release to New Mexico 20,200 acre feet of water annually from the Navajo Reservoir. The "water contract" was signed April 11, 1968, and clearly indicates that the proposed use of water was for thermal electric generation.

75. The "water contract" required New Mexico to install and operate equipment employing the most effective and acceptable equipment available under the technology known at the time of the design of the plant in order to minimize smoke, fly ash and dust in stack emissions. Designs and plans for the air pollution control equipment, stack and other plant features that

might affect air pollution were subject to written approval by the Secretary of Interior or his designated agent in advance of construction, installation, removal or major modification. Periodic review of the equipment by the Secretary was included in the contract and disputes were made the subject of arbitration.

76. Because of the necessity of substantial lead time, a turbine generator was the subject of a letter of intent from New Mexico to Westinghouse Corporation dated October 11, 1967. This letter was modified on December 10, 1968.

77. As of July 25, 1969, Tucson had agreed to participate in the proposed generating station on an equal basis with New Mexico.

78. On August 1, 1969, a firm order was placed for the steam turbine generator at a price of approximately $6,500,000. By letter of October 20, 1969, Stearns-Rogers Corporation was selected to engineer and construct the first unit at the San Juan station. On November 17, 1969, New Mexico committed itself to purchase the boiler for the San Juan generation station at a cost of approximately $9,000,000.

79. On January 1, 1970, the San Juan Plant was an existing project or program and as of that date it was not practicable to reassess the basic decision that the project be constructed.

80. On April 1, 1970, the Bureau of Land Management approved modification of a 1961 mining lease by increasing the lease by 120 acres, which land was contiguous to the existing leases and did not consist of an area large enough for independent development. Such lands would have been isolated if not included within said lease.

81. The Department of Interior selected the Tennessee Valley Authority to examine the air pollution control devices proposed to be installed at the San Juan Plant. After that study and consultation with the National Air Pollution Control Administration, the United States Department of Health, Education and Welfare, and the New Mexico Department of Public Health and Social Services, the Secretary of Interior's designated agent approved the design of the air pollution control equipment by letter dated October 21, 1970, in accord with the approval rights in the contract of April 11, 1968. Because of the need for substantial lead time in ordering the air pollution control equipment, it was necessary to issue the approval at the time it was done. The approval was shaped so as to minimize adverse environmental consequences. It requires that particulate emissions are not to exceed 0.05 pounds per million Btu heat input. The equipment ordered is guaranteed by the manufacturer to remove 99.5% of the particulate matter. The guarantee is well over the water contract minimum level.

82. Federal action since January 1, 1970, has been shaped to minimize adverse environmental consesequences.

83. A statement in accord with Section 102(2)(C) of the National Environmental Policy Act with regard to the San Juan Project is now being prepared.

KAIPAROWITS PROJECT

84. The Kaiparowits Project consists of interests under coal mineral leases relating to lands on the Kaiparowits Plateau in Kane County, Utah, water appropriation and water service rights, and interests in

applications for rights-of-way and plant sites, which are jointly owned in equal undivided interests by the corporations named below, with the objectives of:

(a) Establishing procedures and principles for the initiation of specific projects for the production and utilization of recoverable coal, water supply and plant sites, and

(b) Establishing methods of development of the coal reserve area in an orderly manner with the utilization of coal resources for electric generation or for other uses to be agreed upon by the three participants named below.

85. The Kaiparowits Project is a resource development project as distinguished from a project for the construction of a power generating plant. There are no existing agreements or obligations with respect to constructing a power generating plant or any other facilities for utilization of the coal and water. No federal action has been taken with respect to this project since January 1, 1970.

86. The ownership interests in the Kaiparowits Project are as follows:

Resources Company, a subsidiary of Arizona Public Service Company 33⅓%.

Mono Power Company and/or Associated Southern Investment Company, subsidiaries of Southern California Edison Company 33⅓%.

New Albion Resources Company, a subsidiary of San Diego Gas & Electric Company 33⅓%.

87. In October, 1969, the owners executed a water service contract to take 102,000 acre feet annually from Lake Powell. This contract contains air and water

pollution control provisions similar to those contained in the contracts for the Navajo plant and the other plants.

88. The owners received coal leases from the Bureau of Land Management in November, 1965.

89. An environmental impact statement has not been prepared with respect to federal actions to date on the Kaiparowits Project.

THE SOUTHWEST ENERGY STUDY

90. To meet confirmed power needs in the Southwestern United States, there now are five coal-fired generating plants distributed over a wide area with units in service or with units under construction and to be completed by 1977. These plants and their anticipated 1977 operating capacities are as follows:

Plants	No. of Units	Generating Capacity-mw	Units Completed
Four Corners	5	2,162	5
Mohave	2	1,580	2
San Juan	2	690	—
Huntington Canyon	1	430	—
Navajo	3	2,310	—
Totals	13	7,172	7

91. There is no feasible way to substitute other power generating resources for these five power plants so that the concerned utilities will be able to meet their load responsibilities through 1977. Contributing considerations include engineering lead time required for design and construction of power systems and the problems of capital accumulation. Already, $1.8 billion

has been spent or commited for the construction of these power plants, including transmission lines, coal mines, and associated facilities.

92. The Southwest Energy Study does not deal with the need for the five power plants described above. The existence and production of those plants are basic underlying assumptions for the study. The study is primarily concerned with future proposed electric production and distribution facilities, *i.e.,* new areas and new projects that are not under construction.

ITEM 3

TABLE OF OWNERSHIP OF POWER PLANTS

Ownership of Power Plants

Plant	*Owner*	*Percentage*
Mohave		
	Southern California Edison Company	56
	Nevada Power Company	14
	Department of Water & Power, City of Los Angeles	20
	Salt River Project Agricultural Improvement & Power District	10
Navajo		
	United States of America	24.3
	Salt River Project Agricultural Improvement & Power District	21.7
	Arizona Public Service Company	14
	Tucson Gas & Electric Company	7.5
	Nevada Power Company	11.3
	Department of Water & Power, City of Los Angeles	21.2
Kaiparowits		
	Arizona Public Service Company	18
	Southern California Edison Company	40
	San Diego Gas & Electric Company	23.4
	Salt River Project Agricultural Improvement & Power District	10
	Unassigned	8.6
Huntington		
	Utah Power & Light Company	100
San Juan		
	Tucson Gas & Electric Company	50
	Public Service Company of New Mexico	50
Four Corners		
First 3 units	Arizona Public Service Company	100
Units 4 & 5	Arizona Public Service Company	15
	El Paso Electric Company	7
	Public Service Company of New Mexico	13
	Salt River Project Agricultural Improvement & Power District	10
	Southern California Edison Company	48
	Tucson Gas & Electric Company	7